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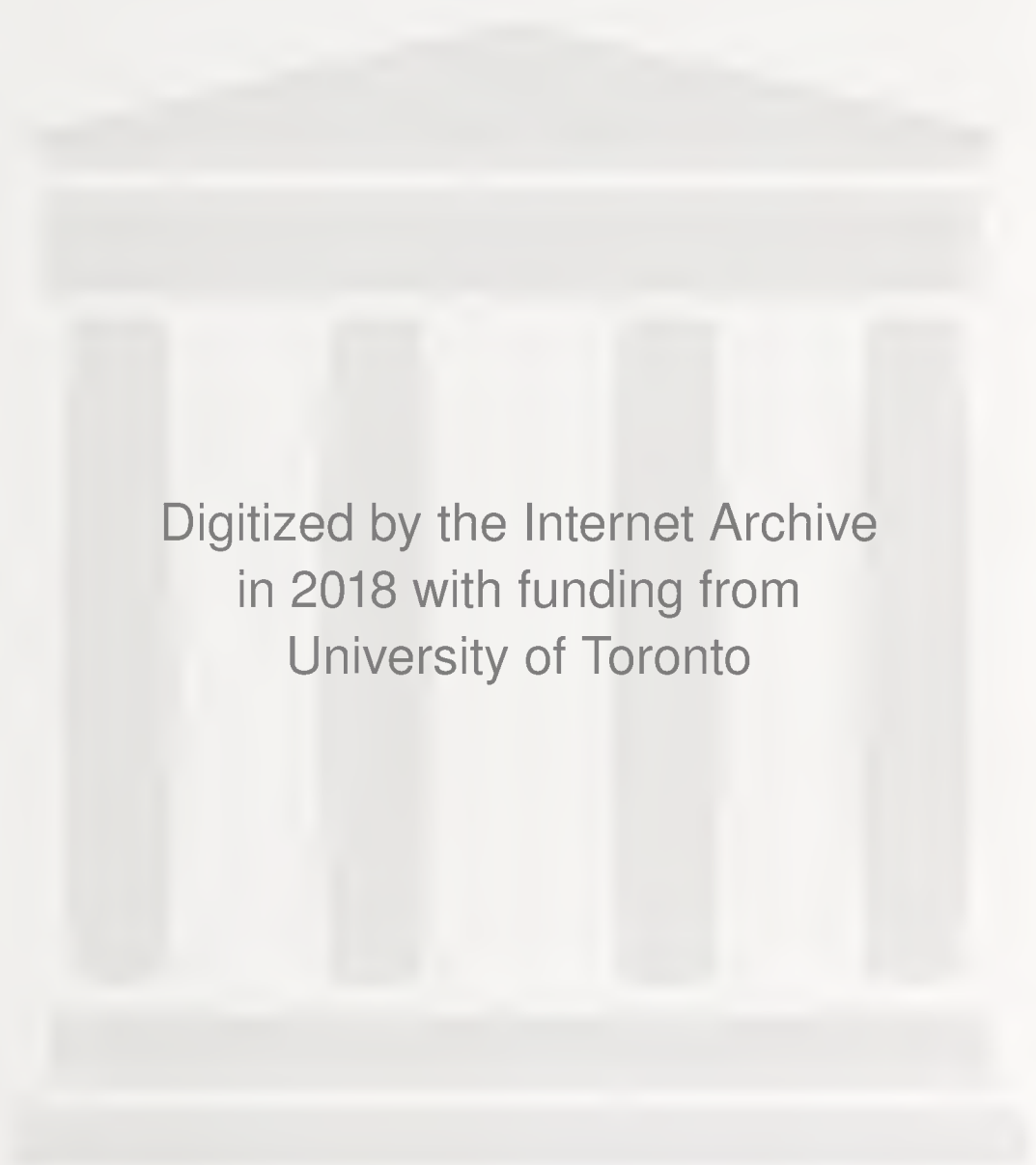
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JONES ON PRESCRIPTION.

A PRACTICAL TREATISE

ON THE

REAL PROPERTY LIMITATION ACT

OF

REVISED STATUTES OF ONTARIO,
CHAPTER 108.

EMBRACING THE LATEST DECISIONS BOTH IN ENGLAND AND CANADA ;

TOGETHER WITH A

FULL COMPENDIUM OF THE LAW ON EASEMENTS.

BY

HERBERT C. JONES, ESQ.

OF TRINITY COLLEGE, TORONTO, M.A. ; OF THE UNIVERSITY OF TORONTO, B.A. ; OF OSGOODE
HALL, BARRISTER-AT-LAW ; AND ADVOCATE IN THE PROVINCE OF QUEBEC.

TORONTO :

R. CARSWELL, 28 ADELAIDE STREET EAST.

1878.

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TO THE

HON. STEPHEN RICHARDS,

TREASURER OF THE LAW SOCIETY OF THE PROVINCE OF ONTARIO,

WITH THE GREATEST RESPECT,

NOT ONLY ON ACCOUNT OF HIS POSITION AT THE HEAD OF A SOCIETY

WHICH HAS PRODUCED SO MANY MEMBERS

JUSTLY CELEBRATED FOR THEIR LEGAL LEARNING,

BUT ALSO FOR HIS

HIGH ATTAINMENTS AS AN ADVOCATE AND LAWYER

THIS WORK IS

DEDICATED BY HIS FELLOW-TOWNSMAN

THE AUTHOR.

P R E F A C E .

Perhaps there is no branch of the law more difficult than that on which I have written, and this treatise, if it does not completely fulfil its mission, may yet be of some assistance.

It is a subject which grows with its knowledge, and it is for this reason that what was intended for a short treatise has increased to such formidable dimensions.

Nor is that to be wondered at when the reader recollects the different Acts embodied in the Statute and the immense number of decisions that have been given ; embracing as it does the Act of 3 & 4 Will. IV. cap. 1, the Act of 10 & 11 Vic. cap. 5, and the recent Ontario Statute with regard to the Limitations of Real Property ; necessarily touching on the Dower Act, and the limitation as to bonds and covenants. The amount of labour and study necessary for the accomplishment of the work may be conjectured, though it will hardly be fully known to any except the author of a law book.

I have been very much assisted by the works of Mr. Charley, "Shelford on Real Property Statutes," "Banning on Limitation of Actions," "Goddard on Easements," "Lewin on Trusts," and many others too numerous to mention. I have endeavoured to give the writers of these able books the credit due, by the proper use of quotation marks when I have quoted from them. If I have neglected to do so at any time, I make the *amende honorable* here.

I have also to thank the Hon. Chief Justice Hagarty and the Hon. Justice Wilson for their kind assistance.

In conclusion, I may say that Messrs. Copp, Clark & Co. have given me every assistance, and by their excellent printing added much to the appearance of the work.

Real Property in a province like Ontario is becoming each year the most valuable kind of property. The increase in the number of Loan and Savings Societies will have a tendency to increase competition, and the transactions in land will grow more numerous as the pecuniary facilities double. It is hoped that this book may be found serviceable not only to the professional reader, but also to the Real Estate Agent, and to that numerous class of *quasi* lawyers called "conveyancers" which abound in Ontario.

The peculiar position of the law with regard to "lateral support" is to be noticed, and the reader will find in the two cases of *Angus v. Dalton* and *Wheelhouse v. Darch*, an opportunity for the expenditure of much thought.

HERBERT C. JONES.

OSGOODE HALL,
Toronto, October 14th, 1878

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INTRODUCTION.

Prescription is defined in the “ Code Civil ” as a “ means of acquiring or of being discharged by lapse of time, and subject to conditions established by law.

“ In positive prescription, title is presumed or confirmed, and ownership is transferred to a possessor by the continuance of his possession.

“ Extinctive or negative prescription is a bar to, and in some cases precludes any action for the fulfilment of an obligation, or the acknowledgment of a right when the creditor has not preferred his claim within the time fixed by law.” Code Civil du Bas Canada, Article 2183.

“ It might at first sight be considered that the duration of wrong ought not to give it a sanction, and that the long suffering of injury should be no bar to the obtaining of right when demanded. But human affairs must be conducted on other principles. It is found to be of the greatest importance to promote peace by affixing a period to the right of disturbing possession. Experience teaches us that owing to the perishable nature of all evidence, the truth cannot be ascertained on any contested question of fact after a considerable lapse of time. The temptation to introduce false evidence grows with the difficulty of detecting it ; and at last long possession affords the proof most likely to be relied upon of the right of property. Independent of the question of right, the disturbance of property after long enjoyment is mischievous ; it is accordingly found both reasonable and useful that enjoyment for a certain period of time against all claimants should be considered exclusive evidence of title.” *First Report of Real Property Commissioners, England*, 39 ; *Dundee Harbour v. Dougall*, 1 McQueen, H. L. C. 321 ; *Brown’s Legal Maxims* (5th edition), 343, 892.

The history of the different prescriptions and times of prescription would be interesting to the student of constitutional history, but we have only space to allude briefly to them here. The first year of Henry I., the reign of Richard I., King John's last return from Ireland into England, the coronation of Henry III., the first voyage of Henry III. into Gascony, were the periods of limitation successively selected in Anglo-Norman times, and continued, some of them, till the reign of Henry VII. In that reign, the Wars of the Roses having unsettled all property, the Legislature rushed to the opposite extreme, and fixed a FIVE years limit by fine and non-claim. Charley's Real Property Acts; 20 Henry III. cap. 8; Stats. West. 1; 3 Edw. I. cap. 39.

Previous to 3 & 4 Will. IV. cap. 27, which has been almost entirely copied into our Canadian Statute Book by 4 Will. IV. cap. 1, the remedy was only barred. By that Statute, the right itself is extinguished (*a*). "This," said Lord Leonards, "is a great improvement. This improvement has been preserved in our Stat. of 38 Vic. cap. 17, s. 15, and the Revised Statutes cap. 108, s. 15. In *Hawks v. Palling* (*b*), the Court asked whether the section did more than extinguish the right to sue."

"There does not," observes Lord St. Leonards, "appear to be sufficient foundation for this doubt. It is not the right to sue that is barred, but the right and title to the subject itself that is extinguished (*c*). The effect is therefore to confer a title on those in possession for the specified period, which the former owner cannot disturb, and which the new owner is competent to convey, and consequently such a title as a Court of Equity will *force on a purchaser*." (*d*)

(*a*) *Beckford v. Wade*, 17 Ves. 87; *Incorporated Soc. v. Richards*, 1 Dru. & War, 289; 1 Wms. Saunders, 283, n.; 2 B. & Ad. 413; 1 B. & Ald. 93.

(*b*) 6 E. & B. 659.

(*c*) Charley's Real Property Acts, 25.

(*d*) *Scott v. Nixon*, 3 Dru. & War. 388; *Lethbridge v. Kirkham*, 25 L. J. (Q. B.) 89; *Tuthill v. Rogers*, 6 Ir. Equity Reports, 441; *Moulton v. Edwards*, 1 De G. and F. & J. 250; Real Property Statutes, 9; Charley, 25.

In Ontario, according to our registry laws, a title by possession is probably the most difficult to get a purchaser to accept. The conveyancer has to *pause* in the construction of his title. He can find nothing on the registry books, and has to search for extraneous evidence in order to complete his chain of title. Of course, this all arises from the folly of our method of transferring land, a folly which it is hoped the Legislature of Ontario will become alive to at some future time. Years may elapse, and this book will be useful in the meantime.

We may mention, however, that the *folly* consists in our system of *dependent title*. No part of the chain is stronger than any particular link. We should amend our folly by adopting the system of *independent title*, whereby each owner of land takes directly from the Crown. That is the system in all the Australian provinces, and it has been found in practice to be beneficial.

Even with our present system it would much facilitate the work of the conveyancer, and, which is of greater moment, increase the security in landed property, if some legal procedure were adopted whereby persons acquiring title by length of possession would be enabled to obtain a patent from the Crown for the land. This would do away with the difficulty of ascertaining the validity of many titles. The operation of this Act will have a tendency to increase the number of persons who hold *merely by possession*; and if their title is good, they should have some means of registering it, and making a good paper title for those who come after them.

We consider the Act for Quieting Titles too cumbrous, and not fitted for this branch of the subject. A short mode of procedure, whereby the person having title by possession might procure a patent from the Crown, is quite sufficient.

It may be remarked that the public cannot release their rights, and there is no extinctive presumption or prescrip-

tion. This has been determined in our own courts in the case of *Nash v. Glover*, 24 Chy. 219, although it naturally arises from the doctrine that the Crown can do no wrong. In the above case, where an original allowance for road had been taken possession of and occupied by the plaintiff, and those under whom he claimed, for a period of forty years and upwards, held that such lengthened possession afforded no ground for opposing the action of the municipality in resuming possession of the road for the purpose of opening up the same.

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JONES ON PRESCRIPTION.

PART I.

REVISED STATUTES OF ONTARIO.

CAP. 108.

An Act respecting the Limitation of Suits relating to Real Property, and the time of prescription in certain cases.

Preliminary, ss. 1-3.

Period of limitation—ten years after right of action accrued, s. 4.

When rights of action deemed to have accrued:

1. On dispossession, s. 5 (1).
2. On abatement or death, s. 5 (2).
3. On alienation, s. 5 (3).
4. In the case of wild lands, s. 5 (4).
5. In case of rent under lease, s. 5 (5).
6. In case of tenancy from year to year, s. 5 (6).
7. In case of tenancy at will, ss. 5 (7) and (8).
8. In case of forfeiture or breach of condition, s. 5 (9), (10).
9. In case of future estates, ss. 5 (10), 5 (11), 5 (12).

Period of limitation as to future estates, s. 6.

Administrator to claim from death of deceased, s. 7.

Entry not to be deemed possession, s. 8.

Continual claims not to preserve rights, s. 9.

Descent cast, warranty, &c., not to bar right of entry or action, s. 10.

Possession of one joint tenant, &c., not to be deemed possession of another, s. 11.

Possession of relatives not to be deemed possession of the heirs, s. 12.

Acknowledgment to be equivalent to possession or receipt of rent, s. 13.

Receipt of rent to be deemed receipt of profits, s. 14.

Right of party out of possession extinguished at the end of the period limited, s. 15.

Action for arrears of dower, rent and interest to be within six years, ss. 16-18.

Mortgages:

Mortgagor out of possession barred after ten years, s. 19.

Acknowledgments, ss. 20, 21.

Mortgagee barred after ten years, s. 22.

Actions for money charged on land and legacies, s. 23, 24.

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Bar of estates tail, ss. 26-28.

Limitation of suits in equity, ss. 29-33.

Prescription in cases of easements:

Profits *à prendre*, s. 34.

Rights of way, water and other easements, s. 35.

Light, s. 36.

Interruptions, s. 37.

Pleadings in actions, &c., ss. 38, 39.

Disabilities and exceptions:

In cases of easements, ss. 40-42.

Time during which a party under disability not to be counted, s. 40.

Term of years excluded in computing time in certain cases, s. 41.

Exception as to lands of the Crown, s. 42.

In cases of land or rent, s. 43-45.

Five years allowed from the termination of disability, s. 43.

Twenty years the utmost allowance, s. 44.

No further time for a succession of disabilities, s. 45.

In 38 Vic. cap. 16, Ontario, 1874, the Act is entitled, "An Act for the further Limitations of Actions and Suits relating to Real Property." The preamble is as follows:

"Whereas it is expedient to lessen the time for making entries and distresses, and for bringing actions and suits to recover land or rent in certain cases from forty to twenty years, and in certain other cases from twenty to ten years, and in certain other cases from ten to five years, and also to lessen the time for redemption by mortgagors, and for recovery of dower, and of money charged on lands or on rent, *and of legacies*; and also to provide for cases of money and legacies charged on land, or on rent secured by express trust, according to the provisions hereinafter contained respectively relating thereto."

A question arose under this Act whether the right to bring an action for a general pecuniary legacy payable out of personal property was curtailed to the period of ten years. It was decided that the Statute of 3 & 4 Will. IV. cap. 27, applied (*a*), and our Revised Statutes have set it at rest.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Real Property Limitation Act.*"

The system of having a short title for Acts of Parliament on account of its convenience has now come into vogue. There is unfortunately no short title by which the Statute of Limitations of the Imperial Act 3 & 4 Will. IV. is known to the law.

As this Act embraces also the Act with regard to Easements, perhaps something might have been said in the title to have called attention to the fact. It is, however, better to have the title for Acts as short as possible, and the student is supposed to gather what is in the Act when he reads it.

2. The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning,

(a) *Shepherd v. Duke*, 9 Sim. 567; *Cooke v. Creswell*, L. R. 2 Eq. 116. *Vide* Revised Statutes, cap. 58, s. 8.

shall in this Act, except where the nature of the provision or the context of the Act excludes such construction, be interpreted as follows, that is to say :

(1.) "Land" shall extend to messuages and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land (and to chattels and other personal property transmissible to heirs), and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency ;

(2.) "Assurance" shall mean any deed or instrument (other than a will) by which any land may be conveyed or transferred at Law or in Equity ; and

(3.) "Rent" shall extend to all annuities and periodical sums of money charged upon or payable out of any land. C. S. U. C. cap. 88, s. 49.

"Land," &c. This definition is taken from the C. S. U. C. cap. 88, s. 49. Also the definition of "Assurance" and "Rent."

The revisers have improved the former section by dividing it, and placing it at the beginning instead of the end of the Act.

The wording of the Imperial Act 3 & 4 Will. IV. cap. 27, s. 1, is as follows :

"Land" shall extend to manors, messuages and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure.

Under the definition of "Land" in the Imperial Statute, turnpike tolls were not within the Act, and consequently more than six years arrears of interest might be recovered notwithstanding the 42nd section of the Act (a). Our

(a) *Mellish v. Brooks*, 3 Bev. 22.

Statute is much more extensive, and takes in all corporeal and incorporeal hereditaments.

Statutes of Limitation are Statutes of repose, and should be construed liberally (*per* Dallas, C. J., in *Tolson v. Kaye*, 6 Moore, 558); see also the maxims, "*Interest reipublicæ ut sit finis litium*," and "*Vigilantibus non dormientibus jura subveniunt*," Broom, 343, 892.

Quarries and limestone land, and land held under grants of the exclusive right to mine would come within the Act (*a*). Shelford says, p. 132, "The limitation prescribed by the 3 & 4 Will. IV. cap. 27, does not apply to an action on a collateral covenant for payment of a rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge is barred by this Statute." *Manning v. Phelps*, 10 Exchequer, 59. Under our Ontario laws, it is submitted that he would not be able to recover the rent.

"Rent." This refers to the estate in the rent, not to the rent reserved, so that a mere non-receipt of rent under a lease for more than twenty years does not deprive the lessor of his right to rent under the lease. *Grant v. Ellis*, 9 M. & W. 113.

Lord St. Leonards said "rent," in the sense in which it is spoken of here, means rent of inheritance, and it does not mean rent reserved by lease, for example, or rent in the common and customary form of a vendor for property. *Dean of Ely v. Bliss*, 2 De G. M. & G. 459 and 472.

"Hereditaments" is a very comprehensive term, including whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed (*b*). An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning or annexed to, or exercisable within the same. In our Act all classes of hereditaments are

(*a*) 3 Ir. Law Rep. 521.

(*b*) Co. Litt. 4; 2 Black. Com. 17.

included, whereas in the English Act it only applies to corporeal hereditaments.

“And to money to be laid out in the purchase of land.” It would appear an odd definition that in interpreting the meaning of “land,” it should be declared to be “money.” This is one of the principles of the Court of Chancery, that where the devise has declared that the money shall be laid out in land, the money should be considered “land.”

“And to chattels and other personal property transmissible to heirs.” This is inserted here in the definition in order to fully carry out the principles of the Imperial Act, 24 Vic. cap. 38, which we have embodied in our Statutes. That Act in substance recites: “Whereas it is expedient that the Act of 3 & 4 Will. IV. cap. 27, should be extended to the case of claims of persons dying intestate.” We refer to this matter subsequently.

“Rent.”—A rent (*reditus*) is properly a sum of money or other thing to be rendered periodically, in consequence of an express reservation in a grant or demise of lands and tenements (*a*).

There are at common law three kinds of rents (*b*). *Rent-service* is so called because it hath some corporeal service incident to it, as at least fealty or the tenant's feudal oath of fidelity (Co. Litt. 142); for if a tenant holds his land by fealty and ten shillings rent, or by the service of ploughing the lord's land and five shillings rent, these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind or in arrear at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired (*c*). A

(*a*) 2 Black. Com. 31; Gibb on Rents, 9.

(*b*) Litt. s. 213.

(*c*) Litt. s. 215.

rent-charge is where the owner of the rent hath no future interest or reversion expectant in the land, as where a man by deed maketh over to others his whole estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind it shall be lawful to distrain for the same. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed, and therefore it is called a *rent-charge*, because in this manner the land is charged with a distress for the payment of it.

In Ontario the common method for farmers is to deed the land to their sons on condition of their sons supporting the fathers. It would be much better to *charge* the land and reserve a rent, making the land subject to a rent-charge which might be recovered by distress against the land itself, no matter who may be in possession.

Rent-seck (*reditus siccus*) is in effect nothing more than a rent reserved by deed, but without any clause of distress (a).

Either a rent service disconnected from the reversion (b), or a rent-charge may be divided by will or by deed operating under the Statute of Uses, so as to make the tenant liable without attornment to several distresses by the devisees or *cestui que use*. It seems that since the Stat. 4 Anne, cap. 16, s. 9, a rent charge may be divided by a conveyance of any kind (c).

There are also other species of rent, which are reducible to these three. *Rents of Assize* are the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be varied or departed from (d). Those of the freeholders are frequently called *chief rents* (*reditus capitales*), and both sorts are indifferently denominated quit rents (*quietus reditus*), because thereby the tenant goes quit

(a) 2 Blk. Com. 42.

(b) *Ards v. Watkin*, Cro. Eliz. 637, 651.

(c) *Rives v. Watson*, 5 M. & W. 255 ; *Colborne v. Wright*, 2 Lev. 239.

(d) 2 Just. 19.

and free of all other services. A *fee farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reservation (a). For a grant of lands reserving so considerable a rent is indeed only letting lands to farm in fee simple instead of the usual method for life or years (2 Bla. Com.). An opinion is expressed by Mr. Hangrave (Co. Litt. 143, n. 5), that the true meaning of fee farm is a perpetual farm or rent, the name being founded on the perpetuity of the rent or service, and not on the quantum; and that the term is not applicable to any rent except *rent-service*, where he differs from Mr. Douglass, who had thought that a fee farm was not necessarily a rent-charge, but might be a *rent-seck* (b). These are the general divisions of rent; but the difference between them (in respect of the remedy for recovering them) is now abolished.

By Statute 4 Geo. II. cap. 28, s. 5, the same remedy was given by distress, and by impounding and selling the same, in cases of rents-seck, rents of assize and chief rents, which had been duly answered or paid for the space of three years, within twenty years before the first day of that session of Parliament (January 21, 1731), or should be thereafter created, as in the case of rent reserved upon leases. As the Parliament of Upper Canada laid down in the year 1792 that the laws of England should hold with regard to civil rights, the differences prior to the Statute of Geo. II. did not and have not entered into the study of the Canadian student. They are mentioned here as interesting in a historical sense.

It may also be mentioned that unless the case is brought within this section of the Statute of Geo. II. a rent-seck cannot be recovered by distress (*Bradbury v. Wright*, Douglass, 627). It is not, however, necessary that the three years mentioned in the Statute should be *continuous*;

(a) Co. Litt. 143.

(b) *Bradbury v. Wright*, Douglass, 627, n. 1.

it is sufficient if, for the space of three whole years within twenty years before the passing of the Act, the rent was paid, though those years may not be consecutive (*a*).

A tenant by elegit has a right to distrain without attornment (*b*).

An action of debt lies on an express covenant for the payment of a freehold rent charged on land conveyed in fee (*c*). A lessee for years assigning his term, reserving a rent, with no clause of distress, not having any reversion, cannot distrain for the rent either by common law or by the Statute (— *v. Cooper*, 2 Wills, 375; *Parmenter v. Webber*, 2 B. Moore, 656; 4 Taunt. 720; 8 Taunt. 593; *Langford v. Selwes*, 3 K. & J. 220); although he may re-enter on the breach of a condition (*Doe v. Bateman*, 2 B. & Ald. 168; *Smith v. Day*, 2 M. & W. 684). A rent-charge granted for life by a tenant for years is good as a chattel interest, and the goods of a stranger not shewn to hold the premises by title paramount to the rent-charge (as by a prior demise) may be distrained for the arrears (*Saffery v. Elgood*, 1 Ad. & El. 191).

Our Statute limits rent to payment of money, whereas the Statute 2 & 3 Will. IV. cap. 27, has been held to payment of other things, or of service. See Paterson, J., remarks, 7 Q. B. 979; also *Doe d. Edney v. Benham*, 7 Q. B. 981. But see the curious case in relation to a grindstone, *Doe d. Robinson v. Hinde*, 2 M. & Rob. 441, and 7 Q. B. 978.

“Annuity” is a thing very distinct from a rent charge, with which it is frequently confounded: a rent charge being a burden imposed upon and issuing out of the lands; whereas an annuity is a yearly sum chargeable only upon the person of the grantor (2 Bla. Com. 40). The material distinction

(*a*) *Musgrave v. Emerson*, 10 Q. B. 326; Shelford's Statutes, 137.

(*b*) *Lloyd v. Davies*, 2 Exch. R. 103.

(*c*) *Varley v. Leigh*, 2 Exch. R. 446.

between an annuity and a rent is that the former is a charge on the personal estate only, and the latter on the real.

An annuity charged upon land is by this clause included in the word "rent" as used in the Act. An annuity charged by will on lands, with a power of distress in default of payment after twenty days, was held to be extinguished by sec. 2, twenty years after the first right to distrain accrued after the testator's death. *James v. Salter*, 2 Bing. N. C. 544.

An annuity given by will and not charged upon land, is within the provision as to legacies in sec. 23.

Lord St. Leonards was of opinion that such an annuity would be extinguished if no payment were made for twenty years (R. P. Stats. 138, 2nd edition). But it has been suggested that time must be reckoned separately with regard to each payment, and that the annuity would not be extinguished by non-payment for twenty years. *Darb. Bos. Stat. Limitations*.

Such an annuity has been decided not to be within sec. 17. *Roch v. Cullen*, 6 Hare, 531. If such an annuity be secured by bond or covenant, the non-payment of each instalment is a distinct breach, and time runs against each as it becomes due. *Arnott v. Holden*, 18 Q. B. 593.

3. This Act shall commence and be deemed to have taken effect, and chapter eighty-eight of the Consolidated Statutes of Upper Canada, and section twenty-two of the Act passed in the thirty-second year of Her Majesty's reign, and chaptered seven, to have been repealed, on and after the first day of July in the year of our Lord one thousand eight hundred and seventy-seven, as respects any person who on and for twelve months continuously after the twenty-first day of December, one thousand eight hundred and seventy-four, resided without this province, and is a person entitled to make an entry or distress or to bring an action or suit to recover any land or rent; or so resident is a mortgagor, or person entitled to redeem within the meaning of the *nineteenth*, *twentieth*, or *twenty-first* sections of this Act; or so resident is a person entitled to, or claiming under a mortgage within the meaning of the *twenty-second* section; or so resident is a person entitled to bring an action, suit, or other proceeding within the meaning of the *twenty-third* section; or so resident is a person entitled to

an action, suit or other proceeding within the meaning of the twenty-fourth section of this Act ; or so resident is a person claiming an estate, interest or right, to take effect after or in defeasance of an estate tail within the meaning of the *twenty-eighth* section ; or so resident is a person entitled to demand dower ; and except as respects the persons, and in the cases mentioned above in this section, this Act shall be deemed to have commenced and taken effect, and the said Acts to have been repealed from and after the first day of July, one thousand eight hundred and seventy-six. 38 Vic. cap. 16, s. 16.

For persons living without the Province continuously, since 21st Dec. 1874, this Act commences to run the 1st July, 1877, for others 1st July, 1876.

LAND OR RENT.

4. No person shall make any entry or distress, or bring any action or suit, to recover any land or rent, but within TEN years next after the time at which the right to make such entry or distress, or to bring such action or suit, first accrued to some person through whom he claims ; or if such right did not accrue to any person through whom he claims, then within TEN years next after the time at which the right to make such entry or distress, or to bring such action or suit, first accrued to the person making or bringing the same. 38 Vic. cap. 16, s. 1.

To students and to non-professional men it may be well to state that the difficulty in most cases as to title is to discover *when the Statute first commenced to run*. If it once commences to run it never stops, and at the end of the time limited by law the person in possession is entitled to the title. *Doe d. Dixon v. Grant et al.*, 3 O. S. 511.

He not only bars the remedy of the original owner to recover, but he obtains a right to the land. It will be obvious to almost any person that, having obtained the right, he should have some means of making it appear. There ought in fact to be a *new departure*—a patent should again issue, and this dependent title system start afresh. This practice and its general utility in these cases will accustom the minds of men to look forward to the time when a system of independent titles will be introduced.

Admission of Cases 11 Oct Rep 352
Harcourt's music 7 app 414

The English Statute, 37 & 38 Vic. cap. 57, has shortened the time to twelve years and six years, but this Act of Ontario shortens the time shorter to ten years and five.

It is a great question whether the English Statute is not better than that made by the combined wisdom of the Legislature of Ontario. To adopt the words of a high ecclesiastic in Ontario, "people should *festina lente*."

However, the reasons for taking this short period may be summed up in the words of the Real Estate Commissioners' Report (a): "As knowledge is diffused, and the administration of justice becomes regular and pure, the periods of limitation may be safely abridged."

"When the Statute first commences to run?" Almost the first question that arises is, what is "*adverse possession*?" (b) There are a good many cases in the Canadian Reports. In *Murray v. Mathews*, 6 O. S. 461, where a line had been agreed upon by the proprietors of adjoining lots on the following terms: "To abide by same so long as we live, and if our children find it wrong they may correct it." *Held*, that this was a permissive occupation, and could not be considered an adverse holding. (c)

In the following cases it has been decided that it was clearly adverse: *Ausman v. Minthorne*, 3 Q. B. 423. A. agreed to sell to B., who went into possession, but failed to make payments. A. then, in presence of B., conveyed to C. B. said he would go off the land but did not do so, and staying on over twenty years, was held to have acquired title. Also, *Doe d. Perry v. Henderson*, 3 Q. B. 486. Also, where a son has been allowed by his father to remain in possession for twenty years, *and it cannot be shewn that he was there as the servant or agent of his father, or has paid rent*

(a) First Report, pp. 42, 43.

(b) English Com., *Nepean v. Doe*, 2 M. & W. 894, 911; 2 Timb's L. C. 614, 6th edition.

(c) *Doe d. Smith v. Deemens*, 3 Q. B. 411, when it has not been adverse possession, but with consent.

within the twenty years, or acknowledged the father's title in writing, the father will lose his title, no matter what the verbal tacit understanding of both parties as to the real ownership might have been. *Doe d. Quinsey v. Caniffe*, 5 Q. B. 602; *vide Fraser et al. v. Fraser et al.*, 14 C. P. 70.

Also, where the owner of land put his father in possession in 1847, under a parol agreement that his father should clear up and cultivate the land, taking to his benefit the profit thereof, the father remained in undisturbed possession until his death in 1870; *held*, that the father had obtained a title by length of possession, and a Bill filed to obtain the delivering up of certain deeds executed between the father and another son, was dismissed with costs. *Truesdell v. Cook*, 18 Chy. 532.

With regard to avoidance by process, the following cases are cited: *Doe d. Ausman v. Minthorne*, 3 Q. B. 423. See further on.

The bringing of an action, not the recovery of possession, stays the operation of the Statute; therefore, where possession was taken under a *hab. fac. poss.*, though after twenty years from the recovery of judgment, *held*, that the possession so taken related to the date of bringing the action, and that the intervening ten years' possession would not enure to the benefit of the tenant so as to assist him in claiming title under the Statute. *Turley v. Williamson*, 15 C. P. 538.

The filing of a petition under the Act for Quieting Titles is not such a proceeding as will save the rights of a party contestant, otherwise barred by the Statute of Limitations. *Laing v. Avery*, 14 Chy. 33.

Where a petitioner, under the Quieting Titles Act, seeks to establish title by possession, under which a title is claimed, must be uninterrupted possession as owner of the land, and should be in accordance with the title set up. *Re Bell*, 3 Chy. Chambers, 239; Taylor, Referee.

A petitioner, under the Act for Quieting Titles, claiming by length of possession, must prove possession for the requisite length of time by clear and positive evidence, which should be of more than one independent witness. *Re Caverhill*, 8 L. J., N. S. 50, Chy.

Quere: If B., in undisturbed possession for twenty years, voluntarily restores possession to C., can B. turn C. out again by reverting to his title under the Act? *Doe d. Ausman v. Minthorne*, 3 Q. B. 423.

Semble: That a plaintiff in ejectment, relying in the opening of his case upon a *prima facie* title by possession, and being met by proof on the part of the defendant of a prior possession, cannot repel such proof by attempting to shew the possession of the defendant that of a tenant to him (the plaintiff) as landlord. He should go into his case fully in the first instance. Robinson, C. J., *diss. Doe d. Osborne v. McDougal*, 6 Q. B. 135.

The practice at the present time would have admitted the evidence.

A defence under the Statute against a clear title is not one to be favoured, especially in cases between relations; and where the jury have leaned against such defence in support of the case, and there has been no misdirection, the defendant must shew very strong grounds to entitle him to a new trial on the evidence. *Hemmingway v. Hemmingway*, 11 Q. B. 237.

As to forty years in case of disability. *Petre et al. v. Mailloux*, 8 C. P. 334; *Myers et al. v. Greeley*, 9 C. P. 297.

A rector is not barred by adverse possession of the glebe land for twenty years, unless he has been incumbent during the whole of that time. *Hill v. McKinnon*, 16 Q. B. 216; *Plowden*, 375; *Runcorn v. Doe d. Cooper*, 5 B. & C. 696, 698; *Barker v. Richardson*, 4 B. & Ald. 579.

Where an action of ejectment brought under the old practice had been stayed owing to an order for security for

costs, and the devise had expired nine years since, the Court refused an amendment by enlarging the term, which would have deprived the defendant of a title acquired under the Statute of Limitations. *Doe d. Day v. Bennett et al.*, 21 Q. B. 405; *vide also Malloch v. Derinan et al.*, 22 Q. B. 54.

Where a party, by deed, has granted a piece of land to another, though he may retain possession of part of the land granted, and though the grantee may suppose his grant does not cover such part, yet if the deed does actually cover the land, the grantee is entitled to it if he asserts his right within twenty years of the date of the grant. *Styles v. Taylor*, 14 C. P. 93.

Possession of land of wife does not give husband absolute right to the land; any grant made by him will only pass an estate for his own life, if his wife should so long live. *Nolan v. Fox*, 15 C. P. 565; *McGregor et al. v. La. Push*, 30 Q. B. 299.

With regard to the effect of registration, a good case is that of *Hamilton et al. v. Lightbody*, 21 C. P. 126.

A deed of the land in question from the testator under whom the plaintiff claimed to one P. was produced by defendant unregistered, and under which the grantee had never taken possession, the testator having retained possession till his death, and his widow and devisee for life having continued in possession under the will which she registered; in all a period of twenty-seven years. *Held*, that the title of the plaintiffs, who claimed under the deceased in remainder under the will, was not defeated by the deed to P., for whatever estate was conferred, by it was lost by the twenty-seven years' adverse possession. *Hamilton et al. v. Lightbody*, 21 C. P. 126; *Boys v. Wood et al.*, 39 Q. B. 495; *McIntyre v. Canada Co.*, 18 Chy. 367; *Connor v. McPherson*, 18 Chy. 607; *Greenstreet v. Paris*, 21 Chy. 229; *Nash v. Glover*, 24 Chy. 219.

An action at law for the assignment of dower is barred by this section. *Marshall v. Smith*, 5 Giff. 37.

A plaintiff, admitted to be in possession, and seeking to displace the title under which the defendants claim on the ground that it was barred by the Statute, need not shew what that title was and how it was barred; but a general allegation, so as to bring the case within that section, is sufficient. *Jones v. Jones*, 16 M. & W. 699.

Shelford says, p. 146: "The word 'rent' in the second section of the Act (4th section of Ontario Act), does not include rents reserved on leases for years, but is confined to rents reserved as an inheritance distinct from the land, and for which, before the Statute, the party entitled might have had an assize, such as ancient rent service, fee farm rents and the like." *Grant v. Ellis*, 9 M. & W. 113. Mere non-receipt therefore of rent under a lease for more than twenty years does not deprive the lessor of his right to rent under the lease. A lessee of premises for one hundred and twenty-five years from the 25th of March, 1782, by a lease dated the 21st July, 1787, and which contained clauses of distress and re-entry, demised the same to a lessee for one hundred and twenty years from the 25th March last past. Twenty-two years of rent accrued due to the representatives of the lessor in the last mentioned lease. It was held that although the original lessee had no reversion expectant on the determination of the lease of the 21st July, 1787, yet that the rent reserved by the lease was a conventional equivalent for the right of occupation, and that therefore the right of the representatives of the original lessee to the rent during the residue of the term was not barred by this section. *Re Turner*, 11 Ir. Ch. Rep. N. S. 304. "It is now clearly established that so long as the relation of landlord and tenant under a lease in writing subsists as a legal relation, the landlord's right to rent is not barred by non-payment for however long a time" (*per* Lord Cranworth, *Archbold v. Scully*, 9 R. L. C. 360).

As to the use of the word "rent" in the Statute, see further on.

5. In the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned.

(1). Where the person claiming such land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession or in the receipt of the profits of such land, or in receipt of such rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were and was so received. C. S. U. C. cap. 88, s. 2.

“Has been dispossessed, or has discontinued such possession or receipt.”

“Dispossession” means the actual ouster or expulsion of a person having a right to the possession. (a)

“Discontinuance” means the quitting possession of what a person has a right to possess, followed by actual possession on the part of another. (b)

Discontinuance *or* dispossession. The Statute is disjunctive. In the case of *Doe d. Taylor v. Proudfoot*, 9 Q. B., 503, which was an action for a small piece of land of two acres, happening to be a surplus in the lot, the circumstances were as follows: Taylor owned the lot of 200 acres, sold the rear 50 acres to Tisdale, and afterwards sold the balance of the land or 150 acres (the three-quarters of the lot) to Kemp, and left possession, supposing he had sold all the land. Between Kemp and Tisdale there appeared in running the lines to be a small piece of two acres. Taylor brings action for this. Verdict for plaintiff, but new trial granted.

Chief Justice Robinson there says: “It seems to me that neither Tisdale nor Kemp nor their vendors have in the

(a) Brown's Stat. Limitations, 445.

(b) *Cannon v. Rivington*, 12 C. B. 1; *Austin v. Llewellyn*, 9 Ex. 276; *Smith v. Lloyd*, 9 Ex. 562; *McDonnell v. McKinty*, 10 Ir. L. R. 574; Brown's Stat. Limitations, 446.

interval taken possession of the small piece of land in contest; but that does not affect the question, and no one has possessed it for twenty years. But dispossession and discontinuance of possession are not both required by the Statute, and there is no doubt that it may happen in cases under the Statute that one may by discontinuance have lost his right, when at the same time no other person can be said to have acquired a right to the property by possession against him. That may lead to consequences perhaps not foreseen by the legislature; but it is a consequence noticed by English commentators on the Statute, not however as a circumstance which can prevent the operation of the Statute as a bar in a clear case of discontinuance of possession."

Absence from the Province is not a discontinuance of possession, within sec. 17 of 4 Wm. IV. cap. 1, *Doe d. Cuthbertson v. McGillis*, 2 C. P. 124; see also *Doe d. Shepherd v. Bayley*, 10 Q. B. 310; *Butler et al. v. Donaldson*, 12 Q. B. 255; *Ketchum v. Ingleton*, 14 Q. B. 99; *Ingalls et ux. v. Arnold et al.*, 14 Q. B. 296; *Pringle v. Allan et al.*, 18 Q. B. 575; *Lloyd v. Henderson*, 25 C. P. 253.

Although the Statute provides in the same sentence both for case of land in which a party is dispossessed and for that of rent which he has ceased to receive, the Statute must be read *reddendo singula singulis, i.e.*, fixing the actual moment of dispossession, or discontinuance of possession at the point from which the (ten) years are to run in the case of land, of which a person has at some moment of time ceased to be in the actual possession; and the last annual payment of rent as the point from which the (ten) years are to run in the case of a person ceasing to receive rent (a).

"Possession." What is the meaning of possession as defined by the cases reported in the Courts of Ontario?

(a) *Owen v. De Beauvoir*, 16 M. & W. 564; New Reports Stats. 37, 2nd edition.

The right to the land is not barred by being out of possession unless some other is in possession (*Ketchum v. Ingleton*, 14 Q. B. 99; *Lloyd v. Henderson*, 25 C. P. 253); but an owner out of possession for twenty years may be barred, though no one of the occupants may have obtained a statutory title (*Kipp v. Incorporated Synod of Diocese of Toronto*, 33 Q. B. 220); though a person seeking to invoke the aid of the Statute against a claim in respect of lands must shew that he, and those under whom he claims, have been in possession of the land, or what in law is equivalent to possession. *Arner v. McKenna*, 9 Chy. 226.

The question of possession seems to have been decided according to the particular case, and according to the evidence in each case. The line of decisions is not well marked, and the decisions themselves are so inconsistent that it leaves a wide field for dispute.

Is the payment of taxes good evidence of possession? In *Doe d. McDonell v. Rattray*, 7 Q. B. 321: "*Semble*: the payment of taxes in itself signifies nothing in making good a title by possession;" while *Davis v. Henderson*, 29 Q. B. 344, *Doe d. Perry v. Henderson*, 3 Q. B. 486, appear to be almost exactly opposite. See also with regard to possession, *McQueen v. McQueen*, 10 Q. B. 193; *Doe d. Shepherd v. Bayley*, 10 Q. B. 310; *Allison v. Rednor*, 14 Q. B. 459; *Young v. Elliot*, 23 Q. B. 420.

POSSESSION AMONG RELATIVES.

Probably one of the latest cases on this point is that of *Stephens v. Simpson*, 12 Chy. 493, affirmed on appeal, A. Wilson, J., dissenting, 15 Chy. 594.

In this case John Simpson, the testator, left the property to his wife in fee by will, and died in 1831. Will was not registered; the eldest son and heir at law went to live on the homestead at that time with his mother, and paid taxes and exercised acts of ownership. The mother died in 1855. Eight years after the death of the mother, the eldest son

(who had been on the land since 1831) mortgaged the farm, and this suit was brought by the mortgagee to foreclose the mortgage. *Held*, the will void as against a duly registered mortgage. The possession must be treated as that of the heir at law; that his brothers and sisters could not, as against a *bona fide* purchaser or mortgagee, allege the possession to have been that of the widow, and thereby set up a title under the Statute; and that, as against such purchaser or mortgagee, the will, under the registry laws, must be treated as fraudulent and void. *Vide White v. Haight*, 11 Chy. 420; *Holmes v. Holmes*, 17 Chy. 610; *Fraser v. Fraser*, 14 C. P. 70.

In the case of *Orr v. Orr*, 31 Q. B. 13, it was held that defendant had no possession as against the mother during her life. See also *Canada Co. v. Douglass*, 27 C. P. 339.

Stephens v. Simpson appears to have been decided more on the peculiar equities of the case. Equity is a very good thing, but when courts of law follow not the decisions it is difficult for lawyers to give an opinion as to what is law. The system of deciding cases on their own merits, without regard to decisions, has been carried so far in our sister Province of Quebec, that the best of lawyers give an equally strong opinion in favour of the merits of both sides of almost any case.

Doe d. Silverthorne v. Teal, 7 Q. B. 370, makes manifest a state of circumstances in which, with all possible care under the old Statute, yet the right to the land was lost. In 1822, A. a maniac, conveyed land to B., who then entered into possession. A. died in 1826. C., his eldest son and heir, became of age in 1829, and died the same year. His brother and heir at law, D., the lessor of the plaintiff, became of age in 1831, and brought his ejectment against B. on the ground that his father was *non compos* at the time of his executing the deed in 1822. D. brought his action more than ten years after the lunatic died, and after he himself came of age, and more than five years after

4 Wm. IV. cap. 1. *Held*, that D. under these facts was barred; *held*, also, that B. could not be considered in possession as the servant or bailiff of the lunatic.

The case of *McArthur et al. v. McArthur*, 14 Q. B. 544, seems to be almost in exact opposition to *Stevens v. Simpson*. If anything, in the former case the equity of the younger brother, who worked the land, seems to be stronger than the latter case of the elder brother. *Vide* also *Rumrell et al. v. Henderson*, 22 C. P. 180.

Two rather opposite decisions with regard to possession may be noticed in *Foster v. Emerson*, 5 Chy. 135; and *Keffer v. Keffer*, 27 C. P. 257. *In de noble o noble 25 Out*

Defendant's father had been in possession of land to which he had no title, legal or equitable, and the legal owner then conveyed it to defendant, a youth about twelve years old, who was living on the lot with his father, and continued to do so for eleven years thereafter, when the property was sold on an execution against the father. *Held*, that the possession after the execution of the deed was the possession of the son; that the father acquired no title thereby against the son; and that the sheriff's deed was void against the son, and should be set aside as a cloud on his title. *McKinnon v. McDonald*, 11 Chy. 432. 37

Two brothers, tenants in common in fee, maintained their father with them on the property. One of the brothers died intestate, leaving his father his heir. The father continued to live with the surviving brother on the property, and to be maintained by him; the father did not affect to be the owner of the property. *Held*, that this living on the property was sufficient to prevent the Statute from running against the father as respected his undivided moiety. *Holmes v. Holmes*, 17 Chy. 610.

POSSESSION OF SERVANT OR CARETAKER.

If defendant can be shewn to have been occupying the land as the servant of the owner during the twenty years,

and not for his own use or benefit, the Statute will not run. *Doe d. Perry et al. v. Henderson*, 3 Q. B. 486; see also *Doe d. Quincy v. Canniff*, 5 Q. B. 602; *Doe d. Silverthorne v. Teal*, 7 Q. B. 370.

Cases decided on possession before 4 Wm. IV. cap. 1: *Doe d. McKay v. Purdy*, 6 O. S. 144. The Statute 4 Wm. IV. cap. 1, has a retrospective operation. Also *Doe d. Kingsley v. Stewart*, 5 Q. B. 108.

ACTUAL AND CONSTRUCTIVE POSSESSION.

Seisin in fee cannot be presumed from a mere constructive possession, but from an actual, visible possession only. *Doe d. Morgan v. Simpson*, 5 O. S. 335; but see Burns' Justice, in *Pringle v. Allan et al.*, 18 Q. B. 575: "Discontinuance may be of a constructive as well as of an actual possession; and in this case there was evidence to go to the jury to find whether the plaintiff had not discontinued the constructive possession which he acquired by descent on the death of the patentee." See *Moffatt v. Walker*, 15 Chy. 155.

The difference between a mortgagor and trespasser is clearly laid down in *Doe d. Dunlop v. McNab*, 5 Q. B. 289. Where several lots of land are mortgaged, and the mortgagor and his heir remain in possession of one of them for more than twenty years, so as to bar, under our Statute 4 Wm. IV., the mortgagee's title, *held*, that the mortgagor's title by possession is not like that of a mere trespasser, but covers the whole land included in the mortgage, as well the lot upon which the mortgagor lived as the other unoccupied lots.

(2). Where the person claiming such land or rent claims the estate or interest of some deceased person who continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and was the last person entitled to such estate or interest who was in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death. C. S. U. C. cap. 88, s. 2.

(3). Where the person claiming such land or rent claims in respect of an estate or interest in possession, granted, appointed or otherwise

assured by any instrument *other than a will*, to him or some person through whom he claims, by a person being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such instrument has been in possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming, as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument. C. S. U. C. cap. 88, s. 2.

(4). In the case of lands granted by the Crown of which the grantee, his heirs or assigns, by themselves, their servants or agents, have not taken actual possession by residing upon or cultivating some portion thereof, and in case some other person not claiming to hold under such grantee has been in possession of such land, such possession having been taken while the land was in a state of nature, then unless it can be *shewn* that such grantee or such person claiming under him while entitled to the lands *had knowledge* of the same being in the actual possession of such other person, the lapse of TEN years shall not bar the right of such grantee or any person claiming under him to bring an action for the recovery of such land, but the right to bring an action shall be deemed to have accrued from the time that such knowledge was obtained; but no such action shall be brought or entry made after TWENTY years from the time such possession was taken as aforesaid. 27 & 28 Vic. cap. 29, s. 1; 38 Vic. cap. 16, s. 15.

POSSESSION WITH REGARD TO WILD LANDS.

The earlier cases seem to hold that the title can only be acquired by possession of the part actually occupied. *Vide Doe d. McDonnell v. Rattray*, 7 Q. B. 321.

“It must depend upon the circumstances of each case whether the jury may not, as against the legal title, properly infer possession of the whole land covered by such title, though the occupation by open acts of ownership, such as clearing, fencing and cultivating, has been limited to a portion;” and *held*, that in this case there was evidence legally sufficient to warrant such inference. *Dundas v. Johnson*, 24 Q. B. 547.

Vide also, limiting the quantity of land to the part actually occupied by the squatter as against the true owner: *Young v. Elliot*, 25 Q. B. 330; *Wishart v. Cook*, 15 Chy. 237; *Love v. Morrison*, 14 Chy. 192.

The following cases seem to lay down the principle that acts of ownership over part of the land may give one the title over the whole. *Davis v. Henderson*, 29 Q. B. 344; *Wigle v. Shennick*, 12 C. P. 325.

In *Davis v. Henderson*, per Morrison, J., "Payment of taxes on the whole is an important fact in such a case." *Heyland v. Scott*, 19 C. P. 165.

The principle laid down in the two last preceding cases, as to the exercise of acts of ownership over wild land sufficient to establish possession under the Statute of Limitations, recognized, and acted upon; and *held*, that the evidence set out in the report of this case was sufficient to shew a title by possession to the south half of the lot, though twenty-five acres only had been actually occupied. *Mulholland v. Conklin*, 22 C. P. 372; see also *McKinnon v. McDonald*, 13 Chy. 152; but see contra, *McMaster v. Morrison*, 14 Chy. 138.

A man cannot be constructively dispossessed of a portion of his land; and if by a mistake in boundaries a portion of an adjacent lot is inclosed for twenty years, the title acquired by the Statute only embraces that portion actually in possession; that such encroachment will not be extended by any application or constructive possession beyond the limits fenced in, nor give the right to insist on the course of that fence as establishing the course of the line of division between the lots, further than the fence has been maintained for twenty years. *Doe d. Hill v. Gander*, 1 Q. B. 3; *Wideman v. Bruel*, 7 C. P. 134; *Doe d. Becket v. Nightingale*, 5 Q. B. 518; *Ferrier v. Moodie*, 12 Q. B. 379.

Twenty years' mutual acquiescence in a boundary line, although differing from that set out in the original survey, is binding upon the owners of adjoining lots, especially if upon this assumed boundary each owner has his full complement of land. *Bell v. Howard*, 6 C. P. 292.

Disputed or mistaken boundaries: *Doe d. Stewart v. Radick*, Tay. 494; *Doe d. Howard v. McDonnell*, Dra.

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374; *Doe d. Morgan v. Simpson*, T. T. 1 & 2 Vic.; *Dennison v. Chew*, 5 O. S. 161; *Doe d. Dunlop v. Servos*, 5 Q. B. 284; *Doe d. Taylor v. Sexton*, 8 Q. B. 264; *Martin v. Wild*, 19 Q. B. 631. The fact that both plaintiff and defendant in the above case were under a common error as to the true boundary, will not prevent the Statute from running against the true line. *McNish et al. v. Munro*, 25 C. P. 290.

As to exchange of land, see *Findley v. Pedan*, 26 C. P. 483; *Taylor v. Croft*, 30 Q. B. 573; *Cole v. Brunt*, 35 Q. B. 103; *Elliot v. Bulmer*, 27 C. P. 217; *Bernard v. Gibson*, 21 Chy. 195.

Possession is considered continuous, though there may be a break: *McLaren et al. v. Morphy*, 19 Q. B. 609; *Lewis v. Kelly*, 17 C. P. 250; *Kipp v. Incorporated Synod of Diocese of Toronto*, 33 Q. B. 220; *McLeod v. Austin et al.*, 37 Q. B. 443.

In ejectment, defendant claimed under a deed from one C. The land had been granted to A., a married woman, and C. proved that in 1825 he got a deed, since lost, from her and her husband, on which was endorsed a certificate of A.'s examination and acknowledgment by two magistrates, both dead, before whom he took her for that purpose. He bought out the interest of one K., who was in possession under an agreement to purchase from A. and her husband, and he paid the balance due to them by K., from whom he received possession. A. and her husband having died within the last five years, their heirs brought ejectment. *Held*, that the plaintiffs were not barred by the Statute, for that C. under the circumstances entered as a purchaser from A. and her husband; that their deed to him being void, he held as tenant at will, and the Statute did not begin to run for a year, since which *forty* years had not elapsed. *Amey et al. v. Card et al.*, 25 Q. B. 501.

The burden of proof is thrown upon the defendant in ejectment to shew that the Statute is inapplicable. *Doe d. McKay v. Purdy et al.*, 6 O. S. 144.

The effect of the exception in favour of the grantee of the Crown who has never gone into possession is, that while ignorant of the fact of his land being in the possession of some other, he is not to be regarded as disseised, and consequently may devise. *Doe d. McGilles v. McGillivray*, 9 Q. B. 9.

It protects the grantee even if unconscious of his title, and believed he had disposed of his land. 9 Q. B. 276.

Holding a bond for a deed does not make the person entitled to the land. *Johnson et al. v. McKenna*, 10 Q. B. 520; *Cushin v. McDonald*, 26 Q. B. 605.

Under the Quieting of Titles Act, a petitioner claiming title by length of possession against the patentee of the Crown, must shew that the patentee or his heir had knowledge of such possession, or he must shew a forty years' possession.

A petitioner claiming title by length of possession must prove possession for the requisite length of time by clear and positive evidence, which should be of more than one independent witness. In such a case, a notice prepared and signed by the referee should be served upon the person having the paper title, if he can be found; but if not, evidence should be put in both of search for him and his representative; and if such search prove fruitless, possession should be shewn long enough against him, even though he had no notice of such possession.

A mortgage more than twenty years old appeared upon the Registrar's Abstract. A discharge of this did not appear to have been registered; none was produced, nor was any proof given of the mortgage ever having been discharged. It was stated on affidavit that nothing was known of the mortgagees, and that no demand had ever been made for the mortgage debt, though nothing had been paid, and that no acknowledgment had been given within twenty years or more. *Held*, that evidence should be adduced of search for the mortgagees or their representatives. That a single

ex parte affidavit that no payment or demand has taken place would not bar claims of mortgagees who could be served with notice. But if they could not be found, notice might be dispensed with after a great length of time and satisfaction presumed (a).

Under the present Statute, he would have only to shew a twenty years' possession. See also *Turley v. Williamson*, 15 C. P. 538; *Doe d. Fitzgerald v. Finn*; *Doe d. Fitzgerald et al. v. Clench*, 1 Q. B. 70; *Stewart v. Murphy*, 16 Q. B. 224; *Mulholland v. Conklin*, 22 C. P. 381; *Stewart v. Murphy*, 16 Q. B. 224; *Hill v. McKinnon*, 16 Q. B. 216; *Armstrong v. Stewart*, 25 C. P. 198; also *Young v. Elliot*, 23 Q. B. 420.

(5). Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent by virtue of a lease in writing, by which a rent amounting to the yearly sum of four dollars or upwards is reserved, and the rent reserved by such lease has been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease has afterwards been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled. C. S. U. C. cap. 88, s. 10.

LANDLORD AND TENANT.

Where a landlord places a tenant in possession of lot one, and the tenant knowingly encroaches on lot two, held that the tenant's occupation does not enure to create for the landlord a title to lot two. *Doe d. Smith v. Deans*, 3 Q. B. 411.

(a) 8 U. C. L. J. 50; *Re Caverhill*, Mowat, V.C., in which he says "possession of part does not give title by prescription to the whole lot." *Hunter v. Farr et al.* 23 U. C. Q. B. 324; *Dundas v. Johnson et al.* 24 U. C. Q. B. 550; *Young v. Elliott*, 25 U. C. Q. B. 334.

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Non-payment of rent does not cause the Statute to run till after the determination of the lease. *Liney v. Rose*, 17 C. P. 186, following *Doe d. Davy v. Oxenham*, 7 M. & W. 131.

In the 3rd sub-section to this section we have followed the English Act, and have inserted the words "other than a will." The case of *James v. Salter*, 2 Bing. N. C. 505, where the plaintiff as an annuitant under a will was declared by the Court not to be barred even after twenty years, and the same case on review in 3 Bing. N. C. 544, where this decision was reversed, is worthy of being noticed. *Vide Doe d. Jacobs v. Philips*, 10 Q. B. 130; *Ganard v. Tuck*, 8 C. B. 231; *Drummond v. Saut*, L. R. 6 Q. B. 763.

(6). Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy was received (whichever last happened). C. S. U. C. cap. 88, s. 9.

This section fixes the time when the right of action accrues either at the end of the first year or other periods of tenancy, or the last time when there was payment of rent. This section is taken from 4 Will. IV. cap. 1, s. 20.

It was held in *McClenaghan v. Barker*, 1 Q. B. 26, as follows: "A letting at an annual rent constitutes a yearly tenancy, which continues at the same rent for the second year as the first, if the tenant remain in possession of the premises; and the landlord may distrain for the first year's rent at the end of the second year; and the Real Property Act 4 Will. IV. cap. 1, s. 20 (the section now under consideration) does not determine the tenancy at the end of the first year so as to make it necessary to distrain within six months afterwards."

Chief Justice Robinson, in delivering the judgment of the Court, said: "With respect to the argument founded on the Real Property Act, 4 Will. IV. cap. 1, s. 20, I am of opinion that that clause must always be taken in connection with the 16th clause (4th sec. of this Ont. Act), and that it can have no effect on the rights of parties until twenty years have elapsed, when its operation applies and not before."

This section requires an instrument in writing which may operate as a lease, and a party holding property for twenty years without such a lease, or payment of any rent, acquires a title. *Doe d. Lansdell v. Gower*, 16 Jur. 100; 21 L. J. Q. B. 57; 17 Q. B. 589.

With regard to admissions of payment of rent, see *Doe d. Earl Spencer v. Becket*, 4 Q. B. 601.

Where the circumstances are disputed. The circumstances connected with the annual payments are very important, for if the person paying makes the payment expressly or impliedly on account of something else than rent of land, of which he is tenant, that would not be a payment of rent within this section. *Attorney-Gen. v. Stephens*, 6 De G. M. & G. 146.

In *Baines v. Lumley*, 16 W. R. 674, the time commenced not to run from the death of lessor, but from the last payment of rent.

In our own courts, in *Liney v. Rose*, 17 C. P. 186, it was held that where in the case of a lease for twenty years, the lessor permits the lessee to continue during the term without payment of rent, the Statute does not begin to run against the lessor and those claiming under him until the determination of the lease. *Vide* also *Davy v. Oxenham*, 7 M. & W. 131; *Doe d. Johnson v. Liversedge*, 11 M. & W. 517.

A lease for life for a nominal rent, not under seal, although it could not pass a freehold interest, would operate as a lease

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from year to year. *Doe d. Lawson v. Coutts*, 5 O. S. 499. Plaintiff claimed under a deed from J., the patentee, dated 12th April, 1853, and proved that on the 4th of April, 1854, he served defendant with a notice to give up possession on the 30th September then next, in failure whereof, "I shall require you to pay me rent of £1 per month for the same, for every month wherein you may continue in possession of the same, until I recover possession of the same by legal proceedings or otherwise." Defendant, at the time of the deed to the plaintiff and for some time previous, had been living on the lot under a verbal agreement with J. that he should have it for several years, and had made improvements. *Held*, that the plaintiff must recover; that the notice was not an acknowledgment of yearly tenancy, so as to entitle defendant to six months' notice; and that the agreement with J. could have no effect. *Cleland v. Kelly*, 13 Q. B. 442. See also as to yearly tenancy the following cases: *Doe v. Coutts*, 5 O. S. U. C. 499; *Doe v. Morse*, 1 B. & Ad. 365; *Beney v. Lindley*, 3 M. & G. 512. "Such leases of land as must be in writing, and are not made by deed, void as leases, leave the effect in all other respects as it was before the Statute was passed." The Statute here alluded to is Con. Stats. cap. 90, s. 4, or Rev. Stats. p. 948, cap. 98, s. 4. *Held*, in *White v. Nelson*, 10 C. P. 158, defendant obtained only a yearly tenancy by means of the correspondence, and was therefore entitled to a six months' notice to quit at least. *Caverhill v. Orris*, 12 C. P. 392; *Sheldon v. Sheldon*, 22 Q. B. 621; *Houghton v. Thompson*, 25 Q. B. 557.

In *Johnson v. McLelland*, *held*, that the receipt of rent by the wife from a tenant of her estate, after the expiration of a term, creates a tenancy from year to year. *Davis v. McKinnon*, 31 Q. B. 564; *Birchall v. Reid*, 35 Q. B. 19; *Manning v. Dever et al.*, 35 Q. B. 294; *Gibboney v. Gibboney*, 36 Q. B. 236; *McPherson v. Norris*, 13 Q. B. 472.

The qualities that distinguish an estate from year to year from proper terms of years, and from estates at will, are

these: it is now raised by construction of law alone, instead of an estate at will, in every instance where a possession is taken with the consent of the legal owner, and where an *annual rent* has been paid, but without having been any conveyance or agreement conveying a legal interest; and that, whether it arises by express agreement or by implication of law, it may, unless surrendered or determined by a regular notice to quit, subsist for an indefinite period if the estate of the lessor will allow of it, and for the whole term of his estate, where it is of a limited duration, unaffected by the death either of the lessor or lessee, or by a conveyance of their estate by either of them. *Birch v. Wright*, 1 T. R. 380. The courts lean rather to construing estates as estates from year to year, and requiring a six months' notice to determine, rather than as estates at will. 3 Burr. R. *Roe v. Lees*, 2 Bl. R. 1171; *Doe v. Weller*, 7 T. R. 478; 1609; *Pope v. Garland*, 4 G. & Coll. 399; *Doe v. Watts*, 7 T. R. 83; *Doe v. Morse*, 1 B. & Ad. 365. Particularly is this the case if the rent reserved is certain, or capable of being ascertained with certainty. *Daniel v. Gracie*, 6 Q. B. 145.

Where a tenant at the end of a term of years held over, and the landlord received rent from him, it was held that the landlord might by a half year's notice require him to quit at the end of the first year after the term of years had expired. *Doe d. Clarke v. Smaridge*, 7 Q. B. 957.

Although a tenancy from year to year is ordinarily implied from the mere receipt of rent (*Bishop v. Howard*, 2 B. & C. 100), it is competent to either the payer or receiver to prove the circumstances under which the payments as for rent were so made, and by such circumstances to repel the legal implication which would result from the payment of rent unexplained. *Doe d. Lord v. Crayo*, 6 C. B. 90.

A demise, "not for one year certain but from year to year," operates as a demise for two years, and consequently the tenant cannot be ejected after a notice to quit at the expiration of the first year. *Denn v. Cartwright*, 4 East. 31.

A lease for one year, and so on from year to year, until the tenancy hereby created shall be determined as hereafter mentioned, with a provision that it should be lawful for either of the parties to determine the tenancy by three months' notice, creates a tenancy for two years certain, and cannot be terminated by a three months' notice to quit at the end of the first year. *Doe d. Chadborn v. Green*, 1 Perry & Dan. 454; 9 Ad. & Ell. 658; *Buckworth v. Simpson*, 1 Cr. M. & R. 834; 5 Tyr. 344.

A tenancy from year to year will not arise by implication where it will work a forfeiture. *Fenney v. Child*, 2 M. & S. 255. The mere fact of occupation, coupled with payment of rent during such occupation, in an under-tenant who is permitted to hold over by the reversioner after the determination of the original lease, does not raise the presumption of a demise for years unless there is some evidence to shew an agreement for a demise for a term. *Simkin v. Ashurst*, 4 Tyr. 781.

Notice to quit must have at least a half year's notice in a tenancy from year to year, computing from the time when the tenancy commenced. *Right v. Darby*, 1 T. R. 159.

Land was let for one year, and so on from year to year, until the tenancy should be determined as after mentioned, with a subsequent proviso that three months should be sufficient notice to be given from either party, and another subsequent proviso that it should be lawful for either party to determine the tenancy by giving three months' notice. It was held that the tenancy was not determinable by three months' notice, expiring before the end of the second year. *Doe d. Chadborn v. Green*, 9 Ad. & Ell. 658; *Birch v. Wright*, 1 T. R. 178, *Doe d. Jenkins v. Cartwright*, 2 Camp. 572; *Thompson v. Maberley*, 4 East. 29.

(7.) Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he

claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. C. S. U. C. cap. 88, s. 7.

This sub-section is the same as 3 & 4 Will. IV. cap. 27, s. 7, except that the proviso in the Imperial Act is inserted in sub-section 8.

A tenant at will is he who enters and enjoys the land by the express or implied consent of the owner, without there being any obligation, either on the part of the lessor or lessee, to continue it for any certain or determinate term. Butler's note to Coke Lit. 270 b.; Leake's Law of Property, 206.

At common law feoffment, or the conveyance of a freehold estate, was effected by *livery of seisin*, that is, by an actual delivery of possession, and by 29 Car. II. cap. 3, s. 1, "estates made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so made or creating the same, or their agents thereunto lawfully authorized, shall have the force and effect of estates at will only."

The plaintiff, by indenture dated 6th April, 1854, did "lease, let and to farm let," the land in question, to defendant, upon the terms that he should pay all rates, levies and assessments upon the said property, &c., and not transfer without the lessor's consent; and the plaintiff did thereby rent unto the defendant (the premises) at the rate of sixpence per acre per annum, payable half-yearly in advance. There was no livery of seisin, nor any time mentioned, but the defendant entered into possession. *Held*, that an estate at will only passed. *Wilmot v. Larabee*, 7 C. P. 407.

"There can be no estate created for life, if there be no livery, nor anything that would be equivalent to it, as if the conveyance could take effect under the Statute of Uses,

which would be equivalent at common law to transfer the freehold; for estates of inheritance or estates for life cannot by common law be conveyed without livery of seisin, and the deed here cannot operate under the Statute. The same investiture or livery of seisin is required to create an estate for life as an estate in fee." C. J. Draper, in *Re Willmott v. Larabee*.

Where A. commenced his possession by the permission of B., and upon a contract to purchase, B. must be held as in the actual possession of the land, through his *tenant at will* A., and as being dispossessed at the end of the first year's tenancy. *Doe d. Perry v. Henderson*, 3 Q. B. 486.

Re-entry by lessor determines the tenancy at will. *Doe d. Shepherd v. Bayley*, 10 Q. B. 310.

A. entered into possession in 1833, and in 1834 agreed to purchase from B., but did not purchase or pay, and held for over twenty-one years; B. was barred, as A. held to be only tenant at will. *Jones v. Cleaveland*, 16 Q. B. 9; *McLaren v. Morphy*, 19 Q. B. 609; *Cahuac v. Scott*, *Cahuac v. Erle*, 22 C. P. 551; *Keffer v. Keffer*, 27 C. P. 257; *Doe d. Kingsley v. Stewart*, 6 Q. B. 108; *Williams v. McDonald*, 33 Q. B. 423; *Rumsell v. Henderson*, 22 C. P. 180; *McNish v. Munro*, 25 C. P. 290.

A tenant at will, in possession of a house and land, was told by the landlord that he must give up possession. Upon his refusing to do so, a writ of ejectment was served upon him, but he subsequently obtained verbal permission to retain the house and a portion of the land rent free for the life of himself and wife; *held*, what had been done amounted to a re-entry, and as a new tenancy was created, the period of twenty-one years was to be reckoned from that time, and not from the original creation of the tenancy at will. *Locke v. Mathews*, 13 C. B. N. S. 753; 11 W. R. 343; *Thorp v. Facey*, 25 L. J. C. P. 349.

TENANCY AT WILL DETERMINED, AND NO NEW TENANCY AT WILL CREATED.

R. C., the purchaser of land, was let into possession before the execution of a conveyance. He let in his son as tenant at will. The son occupied and built a cottage on the land. Afterwards R. C. took a conveyance from the vendor, and some time afterwards he mortgaged the land. The son continued to occupy the premises in all respects as at first, till his death, which happened within twenty-one years of his entry. The son's widow continued to occupy till the expiration of twenty-one years from her husband's entry; it was *held*, that an action of ejectment afterwards brought against her was barred, for that the tenancy at will was not determined by the father's taking a conveyance; and that if it had in point of law been so determined by that event, or by the mortgage, a tenancy at sufferance must be deemed to have commenced from such determination, there being no evidence of a new tenancy at will, and the tenancy altogether had continued more than twenty years. *Doe d. Goody v. Carter*, 9 Q. B. 863; *Doe d. Stanway v. Rock*, 4 M. & G. 30; 1 C. & W. 549. Where a tenant at will had been in possession of land for more than twenty-two years, it was *held*, that time began to run under this section at the expiration of one year from the commencement of the tenancy; and that a question of the subsequent determination of the original tenancy, was only relevant so far as it might have been preliminary to the creation of a fresh tenancy at will, after the determination of the first, and within the period of limitation. *Day v. Day*, L. R. 3 P. C. 751.

As to tenant at will being dispossessed, see *Randall v. Stevens*, 2 El. & Bl. 641; also *Allen v. England*, 3 F. & F. 49.

As to the determination of tenancies at will, see *Dinsdale v. Iles*, 2 Lev. 88; *Doe d. Tornes v. Chamberlaine*, 5 M. & W. 16; *Daniels v. Davidson*, 16 Ves. 252; *Day v. Price*, 9 Bing. 356; *Leighton v. Turred*, 1 Ld. Raymond, 707; *Pinhorn v. Souster*, 8 Exch. 763.

Determination by Insolvent Court. *Doe d. Davies v. Thomas*, 6 Exch. 854; *Hogan v. Hand*, 14 Moore, P. C. C. 310.

As to creations of tenancy at will. *Richardson v. Langridge*, Tudor, L. C. Com. 11, 2nd edition; *Clayton v. Blakey*, 2 Smith, L. C. 108, 6th edition.

(8.) No mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of the preceding section to his mortgagee or trustee. C. S. U. C. cap. 88, s. 8.

This sub-section is a portion of sec. 7 of 3 & 4 Will. IV. cap. 27, being the proviso attached thereto.

Shelford says, page 169: "The proviso as to mortgagors and *cestui que trusts* was introduced to prevent the title of the mortgagee or trustee from being barred in twenty-one years, in those cases in which a mortgagor or *cestui que trust* in possession was held to be tenant at will to the mortgagee or trustee."

As to the relation between mortgagor and mortgagee in possession, see Shelford's Statutes, 169.

The legal interest of the mortgagor after default is not more than that of a tenant by sufferance, and he may be treated as such or as a trespasser at the election of a mortgagee (*Doe v. Maisey*, 8 B. & Cr. 767; *Wheeler v. Montefiore*, 1 Gale & D. 493); and the mortgagor or his tenant, coming in after the mortgage, may be ejected without any demand of possession having been made either by the original mortgagee or his assignee (*Thunder v. Belcher*, 3 East. 449); whereas a tenant at will cannot be ejected on a demise laid previous to the determination of the will (4 T. R. 680), and the mortgagor is not entitled to the growing crops after the will is determined, as in the case of a tenant at will. 1 T. R. 383; see Coote on Mortgages, 325-30; *Walmsley v. Milne*, 7 C. B. N. S. 133. Mortgagor may be ejected without notice, and his estate is inferior to that of a tenant at will. Buller, J., in *Bird v. Wright*, 1 T. R. 378.

See further as to the relations between mortgagee and mortgagor in possession. *Keech v. Hall*, 1 Smith's L. C. 523; and Watkins on Conveyancing, 13, 9th edition; see Shelford's Statutes, 170, 171, 8th edition.

Where a *cestui que trust* of real property is allowed to be in possession, he stands in the legal relation of tenant at will to his trustee (a). The case of *cestui que trust* does not seem to be within the wording of 3 & 4 Will. IV. cap. 27. It requires a very technical reading of the third section of that statute (or fifth of Ontario Act) to hold a *cestui que trust* within its provisions, as a *cestui que trust* is really a person "entitled under such instrument," in the words of the section. Moreover, the case of a *cestui que trust* is specially excluded from the provisions respecting *tenants at will*, which is thus described in *Ganard v. Tuck*, 8 C. B. 231: "The object of the statute was to settle the rights of persons adversely litigating, not to deal with cases of trustee and *cestui que trust*, where there is but one simple interest, that is of the persons beneficially entitled." The provision that no *cestui que trust* shall be deemed to be a tenant at will within this clause, is said by the Court of Common Pleas (in England) to be equivalent to saying, that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy; and the exception seems to be introduced in order to prevent the necessity of any active steps being taken by the trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time. *Ganard v. Tuck*, 8 C. B. 231.

The doctrine that *cestui que trust*, who is in possession of the estate by the consent or acquiescence of the trustee, must be regarded as a tenant at will, only applies when the *cestui que trust* is the actual occupant. If he only receives

(a) *Freeman v. Barnes*, Vent. 55, 80; Barry's Statute of Limitations, 194.

the rents while the estate is in the hands of occupying tenants, he is considered only agent or bailiff of the trustees; and if occupier holds for over twenty years, the trustees are barred. *Mellish v. Leak*, 16 C. B. 652.

“The rule that the Statute of Limitations does not bar a trust estate,” said Lord Hardwicke, “holds only as between *cestui que trust* and trustee, not as between *cestui que trust* and trustee on the one side and strangers on the other, for that would make the Statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore, where *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both.” *Llewellyn v. Mackworth*, 2 Eq. Ca. Ab. 579; S. C. Born. 445. But where articles of agreement for a lease (which was never actually executed) were entered into, and the premises occupied pursuant to the articles from 1771 to 1867, it was *held* that an actual direct trust had been constituted between the owners of the fee and those who held under the articles, and that the *cestui que trust* being in possession, the estate of the trustees was not destroyed by lapse of time. *Drummond v. Saut*, L. R. 6 Q. B. 763.

The proviso only applies to declared or express trusts, and not to a person holding under an agreement to purchase. *Doe d. Stanway v. Rock*, 4 M. & Gr. 30; but see *Drummond v. Saut*, L. R. 6 Q. B. 763.

As to proper caution on the part of the solicitor buying land from his client, *vide Oakes v. Smith*, 17 Chy. 600.

In the case of *Loring v. Loring*, 12 Chy. 347, it was held that as the trust was express, the Statute did not apply, and the legatee was entitled to claim more than six years' arrears of interest.

Conveyances obtained by a solicitor from his client must state the transaction correctly; and the solicitor must pre-

serve evidence that an adequate price was paid, and that the transaction was in all respects fair, and such as a competent and independent adviser of the client would have approved of. Where these obligations are neglected, the suit of the client must be brought within twenty years, but an unexplained delay of less than that period may under the circumstances be a bar. Where nineteen years had elapsed, and the delay was accounted for, the heirs of the client were held entitled to relief. *Oakes v. Smith*, 17 Chy. 660; *Champion v. Rigney*, 1 R. & M. 539; *Geo. Cooper*, 204; *Goddard v. Carlisle*, 9 Pri. 180.

(9). Where the person claiming such land or rent, or the person through whom he claims, has become entitled, by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken. C. S. U. C. cap. 88, s. 2 (5).

This was originally taken from the last clause in section 3 of 3 & 4 Will. IV. cap. 27, s. 2. As the next sub-section has reference to the same subject of forfeiture, we refer the reader to notes on sub-section 10.

(10). Where any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, has first accrued in respect of any estate or interest in reversion or remainder, and the land or rent has not been recovered by virtue of such right, the right to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same became an estate or interest in possession, as if no such forfeiture or breach of condition had happened. C. S. U. C. cap. 88, s. 4.

This sub-section is taken from section 4 of 3 & 4 Will. IV. cap. 27. Before that Statute it was held that though a remainder man expectant on an estate for life or years, to whom a right to bring an ejectment is given by the forfeiture of the tenant for life or years, may take immediate advantage of a forfeiture, yet he is not bound to do so; therefore, if he pursues his remedy within his time, after

the remainder attached, it will be sufficient. Nor can the Statute of Limitations be insisted on against him, for not coming within twenty years after his title accrued by the forfeiture. 1 Ves., Sen. 278; see *Doe d. Allen v. Blakeway*, 5 C. & P. 563.

Formerly it was held in Ireland, that where a landlord or those through whom he claims have received no rent for upwards of twenty years, under an existing lease containing an express clause of re-entry for the non-payment, he is barred, by the 2nd section of 3 & 4 Will. IV. cap. 27, from recovering either the land or the rent, the case falling expressly within that section. *Doe d. Marmion v. Bingham*, 3 I. L. R. 456. But this decision has been overruled. *Cosbie v. Sugrue*, 9 I. L. R. 17; *Parke v. McCloughlin*, 1 Ir. C. L. R. 186; *Spratt v. Sherlock*, 3 Ir. C. L. R. 69. It has been suggested that under such a clause in England, a fresh right to re-enter accrues every time a fresh default in payment of rent is made. Darb. & Bos. Stat. Lim. 251; *Doe v. Bliss*, 4 Taunt. 725; *Macher v. Foundling Hospital*, 1 Ves. & B. 191.

Thus A., tenant for years under a lease with a clause of re-entry for non-payment of rent; B., tenant for life, at the expiration of A.'s tenancy: the right shall be deemed to have *first* accrued to B. at the end of A.'s term of years, although A. might not have paid the rent in the meantime.

It was held that a condition of re-entry, on breach of covenants in a lease, could only operate during the continuance of the lease; when that was determined the proviso was gone, and the reversioner having never been in possession by right of re-entry for the condition broken, could not take advantage of it, and that the lessee who had sown the land was entitled to emblements. *Johns v. Whitley*, 3 Wills. 127.

As to notice of condition: where a party is really ignorant of the existence of an instrument in which the condition is contained, and where he would have a good title if there

were no such instrument, a neglect of the terms of the condition will not subject him to a loss of the estate; and the party entitled to avail himself of the condition must take care to make it known to the person who was to comply with it. *Frances' case*, 8 Rep. 89 b; Shep. T. 148; *Mallon v. Fitzgerald*, 3 Mod. 28; Skin. 125; *Doe d. Kenrick v. Lord W. Beauclerk*, 11 East. 657. An heir at law to whom a devise is made upon condition, is not liable to lose his estate by a breach of the condition, unless he has notice of the devise which contains it; and the onus of proving that the notice has been given lies upon the party entitled to the benefit of the breach of the condition. *Doe d. Taylor v. Crish*, 1 P. & D. 37; 8 Ad. & Ell. 779; 2 Jur. 943.

Particular case with regard to forfeiture of an agreement to purchase land for the purpose of boring for oil. *Marcus v. Smith*, 17 C. P. 416; also *McCord v. Harper*, 26 C. P. 96; *Cameron v. Barnhart*, 14 Chy. 661.

A woman after a second marriage cannot, without her husband's consent, release her right to dower in lands of her first husband. *Howard v. Wilson*, 10 Q. B. 186; affirmed in *McGill v. Squire*, 13 Q. B. 550; *vide Williams v. The Commissioners of the Cobourg Town Trust*, 23 Q. B. 330.

Forfeiture of dower by adultery. Under the Statute of 13 Ed. I. ch. 34, and Westminster II., the question of bar of dower by adultery first arose in our courts in *Graham v. Law*, 6 C. P. 310, where it was held that a wife abandoned by her husband, and subsequently guilty of adultery, did not bar her dower. This was overruled in the cases of *Woolsey v. Finch*, 20 C. P. 132; *Neff v. Thompson*, 20 C. P. 211; where the court, following the decision in England of *Woodward v. Dowse*, 10 C. B. N. S. 722, decided that "it is the voluntary living apart in adultery that deprives a wife of dower, whether leaving the husband's roof was *sua sponte* or in consequence of his violence, or whether he abandoned her without provision."

(11). Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession. C. S. U. C. cap. 88, s. 2. (4).

This sub-section is taken from the 4th branch of section 3 of 3 & 4 Will. IV. cap. 27. The words "or other future estate or interest," will comprehend all executory devises. *James v. Salter*, 3 Bing N. C. 554; *Doe d. Johnson v. Liversedge*, 11 M. & W. 517.

In 1788, estates were settled by marriage settlement to the use of the wife for life, with remainder to her issue in tail, with remainder to the settlor, whose heiress at law she was in fee. In 1818, by deeds to which the husband and wife, and their only son R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the wife for life, remainder to R. G. the son for life, remainder to his issue in tail, remainder to J. F. his sister for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828; it was held that inasmuch as the estate of J. F. was carved out of the estate by R. G., she had the same period for bringing ejectment in respect of any estates comprized in the above deeds, as he would have had, if he had continued alive, viz., twenty years from the year 1822, when his remainder came into possession. The effect of the deed of 1818, and of recovery, was to bar all remainders over, and to create new estates out of his estate tail. *Doe d. Curzon v. Edmonds*, 6 M. & W. 295; *vide* also Darb. & Bos. Stat. Lim. 236-242; also *Doe d. Davey v. Oxtenham*, 7 M. & W. 131; *Grant v. Ellis*, 9 M. & W. 113; *Doe d. Newman v. Godsill*, 5 Jur. 170; 4 Q. B. 603, n.

In *Jumpsen v. Pitchers*, 13 Sim. 327, a husband and wife, seised in fee in right of the wife, conveyed to a purchaser by a conveyance not operative to bind her, it was held that the right of the wife came within the 4th branch of sec. 3 (the present sub-section Ontario Statute), and that she herself, if she should survive her husband, and if not, her heir, could recover the land notwithstanding the purchaser may have been in possession for forty years.

(12). A right to make an entry or a distress, or to bring an action or a suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same became an estate or interest in possession, by the determination of any estate or estates in respect of which such land has been held or the profits thereof or such rent have been received, notwithstanding that the person claiming such land or rent, or some person through whom he claims, has, at any time previously to the creation of the estate or estates which have determined, been in the possession or receipt of the profits of such land, or in receipt of such rent, 38 Vic. cap. 16, s. 2.

6. If the person last entitled to any particular estate on which any future estate or interest was expectant has not been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within ten years next after the time when the right to make an entry or distress, or to bring an action or suit for the recovery of such land or rent, first accrued to the person whose interest has so determined, or within five years next after the time when the estate of the person becoming entitled in possession has become vested in possession, whichever of those two periods is the longer. 38 Vic. cap. 16 s. 3.

Sub-sections 1 & 2 of section 6 are taken from the English Statute 37 & 38 Vic. cap. 57, being the latter part of sec. 2 of that Act.

Our Canadian Statute has divided the section into two parts, and has added sub-sec. 3, which was taken from C. S. U. C. cap. 88, s. 48. Mr. Charley thus speaks of the enactment:

“In order to ascertain the precise intention of the Legislature in passing this enactment, it is necessary to turn to the speech of Lord Selborne, when he as Lord Chancellor introduced the Land Titles and Transfer Bill of 1873, to which the Real Property Limitation Bill of that year, containing this new enactment, was ancillary (a).

“By the Act of Will. IV., a reversioner becoming entitled in possession, after the tenant for life preceding him has been dispossessed, is allowed the full period of twenty years from the time his own right to possession accrues to bring an action or suit, however long the previous dispossession may have lasted; and it is possible that by a succession of several life estates, perhaps created under resettlements made after the dispossession, successive rights of action for twenty years might go on accruing in this way during an extremely long period of time. It is proposed to give any such reversioner either ten years from the time when the preceding tenant for life was dispossessed, or five years from the time when he himself became entitled to the possession, whichever of these periods may be the longest, and no more.”

Lord Selborne then went on to explain the concluding clause of the English Act, which is the 2nd sub-sec. of section 6 of the Ontario Act.

“And if the right of any one reversioner is barred, it is proposed that the bar shall also extend to any subsequent reversioner whose title is derived from any deed, will or instrument, executed or first taking effect after the original dispossession commenced.”

The *Solicitors' Journal* (Vol. XVIII. No. 51, Oct. 17th, 1874), has the following on the point:

“If the person entitled to the last preceding estate was out of possession, the period of limitation shall be the longer of

(a) Hansard.

the two following periods, viz., twelve years (ten in Ontario Act) from the time when the person out of possession first had the right of entry, or six years (five in Ontario) from the time when his successor's estate became vested in possession. If the remainder-man or reversioner is barred, all persons claiming subsequent estates, under instruments taking effect after he became entitled to enter, are to be barred also."

"The evil of allowing each remainder-man twenty years within which to assert a right of action, was frequently commented upon by Mr. Hayes and other eminent writers. It was the hobgoblin conjured up to frighten the Legislature from shortening the length of title that a purchaser could demand. A series of successive life estates may extend over eighty years and more, and the indefatigable statute has to recommence running at the death of each tenant for life. There could be no security for titles, unless at least a sixty years' investigation was made.

"The present enactment mitigates the evil by giving the remainder-man or reversioner only six years (five in Ontario) instead of twenty to pursue his claim, in case the person entitled to the particular estate shall have been out of possession; with this proviso, that if the person out of possession was dispossessed within six years of the time when the remainder-man or reversioner became entitled to the possession, the remainder-man or reversioner can avail himself of the privilege of treating the Statute as running from the date of the dispossession of the person entitled to the particular estate, and substituting twelve (ten in Ontario) for six years as the period of limitation. Of course, if the person entitled to the particular estate was dispossessed six years and one month previous to the date at which the remainder-man or reversioner became entitled to the possession, the advantage of selecting the alternative date would be lost, as more than twelve years (ten in Ontario) would have elapsed, counting six years backward, and six

forward, from the date at which the remainder-man or reversioner became entitled to the possession" (a).

(2). If the right of any such person to make such entry or distress, or to bring any such action or suit, has been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement *executed or taking effect after the time* when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, first accrued to the owner of the particular estate whose interest has so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent. 38 Vic. cap. 16, s. 4.

In the English Statute our sub-sections 1 & 2 form one section. The reader will be able to judge of the remark of V. C. Hall, quoted hereafter, by means of this reference.

This sub-section appears to mean this:

Under a will:

A. tenant for life.

B. tenant for life on the decease of A.

C. tenant in fee on the decease of B.

Now, at the death of the testator all the interests of A. B. and C. become vested interests.

Suppose N., a squatter, takes possession of the land six years before A.'s death. On the death of A., B. will have five years to bring an action or suit as his furthest limit. Suppose B. during the time of A.'s life, and during the time A. was out of possession, sells his interest, and deeds to D. This section means that D. shall have no further time to bring his action or suit than B. had. He in fact takes under an instrument which was executed "after the time when a right to make an entry or distress, or to bring an action or suit for the recovery of such land or rent, first accrued to the owner of the particular estate." That is, first accrued to A. at the time when the squatter went into possession.

(a) "Lord Selborne has kindly expressed to the writer his approval of this construction."—Charley's Real Property Acts, 1874, p. 38.

Suppose D. did not take any steps to recover the land for over five years after A.'s death, or suppose the deed from B. to D. was not executed till five years after the death of A. (the squatter still being in possession), at which time B.'s interest was barred, then under this section D. would be barred from recovering the land. C.'s interest would also be barred.

“ Sir Charles Hall, V. C., has kindly favoured the writer with the following explanatory note: That part of the enactment which begins, ‘And if the right’ (the 2nd sub-sec. of section 6 of Ontario Act) clearly applies only to a person deriving title under a person barred, under the earlier part of the section; the object being to prevent an extension of time for asserting title in favour of a person deriving title under a person against whom time has begun to run or has actually run ” (a).

(3). Where the right of any person to make an entry or distress, or to bring an action to recover any land or rent to which he has been entitled for an estate or interest in possession, has been barred by the determination of the period, hereinbefore limited, which is applicable in such case, and such person has, at any time during the said period, been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action, shall be made or brought by such person, or any person claiming through him, to recover such land or rent in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent has been recovered by some person entitled to an estate, interest or right which has been limited or taken effect after or in defeasance of such estate or interest in possession. C. S. U. C. cap. 88, s. 48.

This section is taken from C. S. U. C. cap. 88, s. 48, from thence from 4 Will. IV. cap. 1, and from thence from the English Statute 3 & 4 Will. IV. cap. 27, sec. 20.

Mr. Brown, in his Statute of Limitations, has thus neatly paraphrased the crabbed phraseology of the Act:

(a) Charley's Real Property Acts, 1874, p. 38.

“When any person has been barred of any estate or interest in possession of any land or rent by the determination of the period of limitation, and has during that period been entitled to any future estate, interest, right or possibility, in the same land or rent, no new right accrues to such person on such future estate, interest, right or possibility, coming into possession (a).

“But if, before such future estate, right or possibility, come into possession, the land or rent has been recovered by some person entitled to an estate, right or interest limited or taking effect after or in defeasance of the estate or interest in possession, a new right accrues to the person claiming such future estate, interest, right or possibility, on its coming into possession” (b).

Supposed case.

Under a will: A. tenant for life, remainder to B. for life, remainder to the heirs of A.

Under the rule in Shelley's case, A. would take an estate in fee simple, subject to B.'s life interest.

A squatter goes on the land, and holds for ten years, and A. is barred during his lifetime. At the death of A., B. has five years to bring his action. He brings the action and recovers the possession of the land. Now at the death of B., the heirs of A. are entitled to the land. As in the meantime such land was recovered by some person entitled to an estate limited or taking effect after A.'s interest in possession, then A.'s heirs would have the right to recover.

But if B. had not recovered the possession, A.'s heirs would have had no right to bring the action, but would have been barred because A. was barred.

With regard to this section, Mr. Charley says:

“Thus, where an estate was limited to A. B. and his wife, and to his heirs and assigns, and A. B. absconded and

(a) *Doe d. Hale v. Mousdale*, 16 M. & W. 689; *Clarke v. Clarke*, Ir. L. R. (Q. B.) 395.

(b) Brown's Statute of Limitations, Bk. IV. cap. 4, s. 3. p. 457.

his wife took possession, and continued in possession till her death, it was held that the possession by the wife came within the range of the 20th section, and gave her husband's assignees in bankruptcy a new right to the remainder in fee, the recovery contemplated by that section not being necessarily a recovery by virtue of legal process." The right of the heirs of the husband was held to be a "future estate," within the meaning of the 4th clause of the 3rd section of the Statute of Limitations of Will. IV. (a).

7. For the purposes of this Act, an administrator claiming the estate or interest of the deceased person of whose chattels he has been appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration. C. S. U. C. cap. 88, s. 6.

This section is taken from 3 & 4 Will. IV. cap. 1, s. 18, which was taken from Imperial Statute, sec. 6.

The object of this clause of the Act is to make the period of limitation with respect to chattel interest in land begin to run from the time when the right of entry arose, and might have been acquired by taking out letters of administration. The next of kin and creditors of an intestate will have no just cause of complaint, if for twenty years they neglect their rights, and great injustice might be done to the party in possession, by allowing a stale demand to be brought forward after a longer lapse of time (b).

The old rule, that time ran from the grant of the letters of administration, produced evil. In the case of *Flairclaim v. Little*, 5 Barn & Ald. 214, administration of the effects of C. was first *granted eighty years after his death*.

The distinction between an administrator and executor is, that an administrator derives his title wholly from the ecclesiastical court, and has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant (c).

(a) *Doe d. Johnson v. Liversedge*, 11 M. & W. 517.

(b) 1st Real Prop. Rep. p. 48.

(c) *Woolley v. Clark*, 5 B. & Ald. 744.

The title of administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so that he may recover against a wrong doer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover (a).

But this doctrine of relation exists only in cases where the act is done for the benefit of the estate. *Morgan v. Thomas*, 8 Exch. 302. On the other hand, an executor derives his title from the will itself, and the property vests in him from the moment of the testator's death. *Hickman v. Walker*, Willes, 27.

Where letters of administration have been granted, the administrator is entitled to all the rights which the intestate had at the time of his death vested in him; although no right of action accrues to the administrator until he has obtained letters of administration. *Pratt v. Swaine*, 8 Barn. & Cress. 287. An executor or administrator is not deemed to be in possession of things immovable, as leases for years, or houses before entry (Went. Off. Ex. 228, 4th ed.), although a reversion of a term, which the testator granted *for part* of the term, is in the executor immediately on the testator's death. *Trattle v. King*, T. Jones, 170. But the relation of the grant of administration to the death of the intestate, did not it seems divest any right legally vested in another, between the death of the intestate and the grant, so as to enable an administrator, who had obtained letters of administration after an execution issued against the intestate's tenant, to call on the sheriff to pay one year's rent, pursuant to the Statute 8 Anne, cap. 17. *Waring v. Dewberry*, Gilb. Eq. Rep. 223.

It seems that the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so as to enable him to bring actions in respect of that property for all matters affecting the same subsequent

(a) *Thorpe v. Stallwood*, 5 M. & G. 760; *Foster v. Bates*, 12 M. & W. 233; *Welchman v. Sturgis*, 13 Q. B. 552.

to the death of the intestate, and to render him liable to an account for the rents and profits of it, from the death of the intestate. *Rex v. Inhabitants of Horsley*, 8 East. 410. And in ejectment by an administrator, the demise might be laid on a day after the intestate's death, but before the administration granted. Selwyn's N. P. 716, 10th edition. *Holland v. King*, 6 C. B. 727.

Delay on the part of executors to collect rents or sell lands will render them liable, and the courts of Ontario have held executors and administrators strictly accountable for rents and profits. *Vide Ernes v. Ernes*, 11 Chy. 325.

Executors should proceed with promptitude to realize the assets, and the law presumes that, as a general rule, a year should be sufficient for this purpose. They should exercise a reasonable discretion as to suing debtors, and preserve evidence of having done so, in the case of uncollected debts, the onus of proof being on them and not on the legatees. But where the result proves unfortunate they are not charged with the loss, though the court should not concur in the propriety of the course which, in the *bona fide* exercise of their discretion, they took. A delay of ten months, which resulted in the loss of a debt, was held to require explanation. *McCargar v. McKinnon*, 15 Chy. 351.

On a purchase of land, the vendee gave his note payable in a year with interest, for part of the purchase money. The vendor died before the note became due, and administration was not taken out for eleven years. In a suit commenced a year afterwards by the administrator, it was held that as the cause of action did not arise until there was some person to sue (some person to commence the suit), interest was recoverable for the whole period, from the date of the note. *Stephenson v. Hodder*, 15 Chy. 570; *vide also Scat-herd v. Kielly*, 22 Chy. 8.

In England, "when time has nearly run against a creditor in his lifetime and he dies, his executor will be barred if the statutory time has elapsed though he brings an action

within a reasonable time after his testator's death. *Penny v. Brice*, 18 C. B. N. S. 393. But if debtor dies intestate, and time has not commenced to run, it will not commence to run until letters of administration have been taken out to the deceased, inasmuch as there has never been any person against whom the creditor could have prosecuted his remedy" (a). Even if the debtor appoints an executor until proof (b), if time has commenced to run in the debtor's lifetime, it will not stop (c). In *Glass v. Hope*, in Appeal, 16 Chy. 420, which was well argued in our own courts and went to the Court of Appeal, it was held that when time has not commenced to run against a testator when alive, it will not commence till after letters of administration be taken out.

It should not be supposed that an executor is bound to take advantage of the Statute of Limitations on pain of making himself personally liable. This is well settled in the case of *McCullough v. Davis*, 9 Dow. & Ry. 43, where Lord Hatherly says: "It certainly cannot be considered to be law at the present day, that executors, paying a debt against the recovery of which the Statute of Limitations might be pleaded as a legal bar, render themselves liable to those who are interested in the testator's property." *Vide* also *Hill v. Walker*, 4 K. & J. 166. Even if the personal estate be not sufficient, and the payment of the debt would throw a burden on the real estate. *Vide Lewis v. Rumney*, L. R. 4 Eq. 451. An executor may also retain assets of the testator sufficient to pay debts due from the testator to himself (d). A legatee who is an executor is not barred

(a) Barry's Statute of Limitations, 229; *Joliff v. Pitt*, 2 Vern. 694; *Webster v. Webster*, 10 Ves. 93; *Burdick v. Garrick*, L. R. 5 Chy. 233.

(b) *Forrest v. Douglass*, 4 Bing. 704.

(c) *Rhodes v. Smethurst*, 4 M. & W. 42; *Boatwright v. Boatwright*, L. R. 17 Eq. 71.

(d) *Norton v. Frecker*, 1 Atk. 533; *Stahls melt v. Lett*, 1 Sm. & Giff. 415; *Ex parte Dewdney*, 15 Ves. 498; *Williamson v. Naylor*, 3 Y. & C. 211, note (a); *Hill v. Walker*, 4 Kay & J. 166.

because he can pay himself (*a*). The same reasoning seems to apply to creditors (*b*).

8. No person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon. C. S. U. C. cap. 88, s. 11.

This section is taken from the Con. Stat., thence from 3 & 4 Will. IV. cap. 1, whence it was taken from 3 & 4 Will. IV. cap. 27, s. 10.

By Stat. 21 Jac. I. cap. 16, it was enacted that no entry should be made by any man upon lands, unless within twenty years after his right should accrue. An entry to avoid a fine with proclamations, though not authorized by the party in whose behalf it was made, is sufficiently ratified by an action of ejectment founded on it. *Doe d. Blight v. Pett*, 11 Ad. & Ell. 842; 4 P. & D. 278.

By 4 & 5 Anne, cap. 16, s. 14, it was enacted that no entry upon lands should be of force to satisfy the Statute of Limitations (21 Jac. I. cap. 16), or to avoid a fine levied of lands, unless an action was thereupon commenced within one year after, and prosecuted with effect. 1 Wins. Saunders, 319. This clause in the Act will have the effect of shortening the period within which an ejectment can be brought, for under the Statute of Anne, a party might enter just before the expiration of the twenty years, and commence his action within one year afterwards.

The defendant being in adverse possession of a hut and piece of land, the lord of the manor entered in the absence of the defendant, but in the presence of his family said he took possession in his own right, and he caused a stone to be taken from the hut, and a portion of the fence to be removed. *Held*, that these acts were not sufficient to disturb the defendant's possession under this section. *Doe d. Baker v. Combes*, 19 L. J. C. P. 306. If there be adverse

(*a*) *Binns v. Nichols*, 2 Eq. 256.

(*b*) *Rhodes v. Smethurst*, 4 M. & W. 42.

possession of land, that adverse possession will be interrupted (so as to cause the Statute of Limitations to run as against the true owner) by the true owner entering on the land, asserting his rights, and entirely removing that which constituted the possession of the tortious possessor. And as a matter of law, it is unnecessary for the true owner to go on and shew that he continued in possession. *Worssam v. Vanderbrande*, 17 W. R. 53.

Seisin is a technical term, to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. 1 Burr. 107.

A seisin in law was sufficient to give the wife dower out of her husband's property.

A seisin in law, in its usual acceptation, is where the inheritance in lands and hereditaments of which a man died seisin or possessed descends upon his heir, who died before entry or possession. In such a case, if the heir leave a widow, she shall be entitled to her dower. Litt. s. 681.

What is an entry, and what is a necessary entry to take the case out of the Statute?

In *Henderson v. Harris*, 30 Q. B. 360, one G., owning land, allowed a school house to be built upon it in 1840, and a school was kept there until 1851, when a new site was obtained, and the trustees sold the old house. Before doing so, however, they sent for G. to get his consent; and he came to the house and said the purchaser might live in it until the land was cleared up around it. In ejectment against defendant claiming under the purchaser: *held*, that there was evidence of an entry by G. in 1851, from which time only possession would run; and that the plaintiff therefore was not barred.

Where one was in possession of the land, claiming as assignee of a bond for a deed made by the owner in fee, whose estate B. took by demise: *held*, that an entry by B.

animo possidendi, and inclosing the land with a field of his own adjoining, caused the Statute to cease to run as against B.; and that the right of entry of B., and those claiming under him, dated from an entry thereafter made by the defendants, upon B.'s possession so obtained. *Clements v. Martin et al.*, 21 C. P. 512.

Ejectment for three acres and one acre, separate parcels of Lot 36, in the 2nd concession of Lochiel. On the 16th June, 1839, McD., mother of the plaintiff, became owner of the whole lot by conveyance from the grantee of the crown. On the 6th April, 1847, she conveyed the whole lot to W. her son, by a deed which was to be given to him when he should give security for her support. This he did by bond, and the deed to him was registered on the 20th April, 1857. On the 16th April, 1849, however, she conveyed to the plaintiff (another son), the three acre parcel by a deed registered the 2nd October, 1849. On the 10th June, 1851, W. conveyed the one acre parcel to the plaintiff. On the 17th May, 1862, W. gave a mortgage on the lot to the plaintiff, registered 23rd September, 1862, to secure advances made by plaintiff to pay off a previous mortgage to defendant, which mortgage to plaintiff contained a reservation of four acres already made by deeds of conveyance to plaintiff from McD. and W. This mortgage was discharged before this suit was commenced. On the 28th December, 1868, W. conveyed the whole lot to defendant, without any reservation of the three or one acre parcels. W. lived on the lot, and used it as owner from the date of the conveyance to him in 1847, till he sold it in 1868. The plaintiff went to the United States in 1849, but came back yearly and stayed on the lot, where his mother also lived with W. In his evidence W. said he always considered the four acres to be his brother's, and did not hold them adversely, but made no difference in the working: *held*, as to the three acre parcel, that the plaintiff was barred by the Statute of Limitations, notwithstanding his annual visits to the land.

Held also (Wilson, J., dissenting), that the reservation in the mortgage to the plaintiff by the defendant, dated 17th May, 1862, was not an acknowledgment of plaintiff's title at that time to the lands so reserved. *Held* also, as to the one acre conveyed to plaintiff by W. on 10th June, 1851, that W. being allowed to remain in possession, was a tenant at will, which tenancy ended on the 10th June, 1852, and the action having been commenced on the 14th June, 1871, the plaintiff was not barred. *Per* Wilson, J.: Taking the words in connection with the transactions between the parties, the one conveying and the other receiving the mortgaged land, the reservation in the mortgage of the 17th May, 1862, was an express and unequivocal declaration in writing, that the plaintiff's title to the four acres was valid, and subsisting at that time. *Williams v. McDonald*, 33 Q. B. 423.

On the 9th of January, 1844, one J. W. took possession of the land in question, under an instrument of lease for four years, executed by C., the owner under power of attorney, at the rate of £15 a year. This instrument also contained the right to purchase for £250, £50 to be paid on the execution of the instrument, and the balance in four instalments of £50 each on the 9th of January in each year, the first payment to be made on the 9th of January, 1845; and if purchase carried out, in lieu of the rent reserved, a sum equal to six per cent. on the original purchase money should be paid. J. W. made the first payment of the £50 at the time of executing the instrument, and deposited £50 in the bank to meet the second; but the person in whom the legal estate was vested having died, it was not paid, and nothing more was done. J. W. remained in possession until his death in 1850; when he was succeeded by his son, to whom it appeared that he had previously sold, and the son conveyed to the defendants, who entered, and had been in possession ever since. *Held*, that H. the plaintiff, claiming under C.'s will, was barred by the Statute. *Held* also,

that the execution of a deed in 1862 by J. W.'s heir at law, to one R., who in 1869 conveyed to the plaintiff, did not defeat the defendants' title, as they were in possession, not in privity with him. *Cahuac v. Scott*, and *Cahuac v. Erle*, 22 C. P. 551.

In *Palmer v. Thornbeck*, 27 C. P. 291, it is suggested that a slight entry is sufficient to stop the running of the Statute of Limitations. In this case it appeared that over twenty years ago a fence was mutually erected by plaintiff and defendant's father, who then occupied Lot 32, as a line fence along the course of an old blazed line, though for what purpose such line had been run did not appear. The fence continued to be used as a line fence until 1862-63, when, in consequence of the survey made under the 24 Vic. cap. 64, and 25 Vic. cap. 38, the plaintiff claimed that the line was incorrect, and he procured the surveyor who had made the survey to run the line. The surveyor divided equally the space in the block containing these two lots between the road monuments, planted several years previously by himself at the front angles of the side road allowances; but there was no evidence to show how he ascertained the position of the side roads in making the survey, or of any search for the original monument. In 1865-66, after this new line had been run, the plaintiff pulled down a piece of the old fence and removed it to the new line, where it remained for two or three days, until put back by the defendants to the original line, where it had so remained ever since. *Semble*, that the plaintiff's entry in 1865-66 was sufficient to stop the running of the Statute of Limitations. See also *Canada Co. v. Douglass*, 27 C. P. 339.

9. No continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action. C. S. U. C. cap. 88, s. 12.

This is taken from 3 & 4 Will. IV. cap. 27, s. 11.

Previously to the enactment in this and the preceding section, an actual entry made by one who had a legal right to enter on an estate, or by his agent duly authorized by power of attorney, if made peaceably, and repeated once in the space of every year and a day (which was called continual claim), was deemed sufficient to prevent the right of entry from being tolled by a descent cast or discontinuance, or barred by the Statute of Limitations. Litt. ss. 414, 415; Runn. Eject. 51, 52, second edition; Ad. Eject. 101, third edition; *Ford v. Grey*, 1 Salk. 285. Actual entry was sufficient to keep alive the right of a person disseised, but a mere demand, without process or acknowledgment, was not sufficient against the Statute of Limitations. *Hodde v. Healey*, 1 Ves. & B. 540.

We refer reader to cases mentioned *infra* as to entry of adjoining lots.

POSSESSION BEFORE PATENT, OR AS AGAINST THE CROWN.

The Statute of Limitations does not run against the Crown. *Doe d. West v. Howard et al.*, 50, s. 462. ✕

Where in the case of *Regina v. McCormick*, the defendants and those through whom they claimed had been in possession for over sixty years, and pleaded the Nullum Tempus Act of 9 Geo. III. cap. 16, it was *held*, that that Act applies to this province, but it would only apply to those who held adversely to the Crown under a claim of title, and not to mere trespassers. *Regina v. McCormick*, 18 Q. B. 131.

Plaintiff and defendant held the north and south halves of a lot respectively as lessees from the Crown. Defendant entered and held possession up to a certain line for more than twenty years, and the plaintiff had held the remainder for some sixteen years. They then each obtained patents for their halves, and on discovery that the lot overran, and that the defendant's fence encroached upon his half, plaintiff

but see Hamilton Crown & Town

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brought ejectment: *Held*, that he was entitled to recover; that the possession by the defendant could not affect the title derived under the patent, for the Statute did not run while the fee was in the Crown. *Jameson v. Harker*, 12 Q. B. 590; see also *Dowsett v. Cox*, 18 Q. B. 594.

The practice with regard to Crown cases is laid out pretty fully in the case of *Regina v. Sinnott*, 27 Q. B. 539, where it was *held*, there being no proof that the Crown had been out of possession for twenty years, that under "not guilty" defendant could not give evidence of title under a Crown lease. *Held* also, that the Crown on this plea were not entitled to judgment at once, but must go down to trial to show the intrusion and damages; and because defendants under the plea might shew the Crown out of possession for twenty years, and thus put the Crown to proof of title.

The Statute of Limitations does not run against the Crown even as trustee. *Regina v. Williams*, 39 Q. B. 397; also *Doe d. Fitzgerald v. Finn*, 1 Q. B. 70.

10. No descent cast, discontinuance or warranty, which has happened or been made since the first day of July, one thousand eight hundred and thirty-four, or which may hereafter happen or be made, shall toll or defeat any right of entry or action for the recovery of land. C. S. U. C. cap. 27, s. 80.

From 3 & 4 Will. IV. cap. 27, s. 39.

"Descent cast," the devolving of realty upon the heir on the death of his ancestor intestate.

"Shall toll or defeat." Toll an entry is to deny and take away the right of entry (a).

A mere entry is not possession. Continual or other claim will no longer preserve any right of entry, or distress or action. By the common law, descents of corporeal inheritances in fee simply took away the entry of the party who had right, as if the disseisor died seised, and the lands descended to his heir, the entry of the disseisee was thereby

(a) Wharton's Law Dictionary.

taken away, unless there had been a “continual claim,” and the like law was of an abatement and intrusion, and of the feoffees or donees of abators or intruders. Litt. s. 385–414. But by Statute 32 Hen. VIII. cap. 33, the “dying seised of any disseisor of and in any lands, &c., having no title therein, shall not be deemed a descent to take away the entry of the person or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled.” If a disseisor (squatter) died five years after quiet possession, and the disseisee (owner of title) entered, the heir of the former might have maintained an ejectment, for the right of possession belonged to him, although the mere right (to the land) was in the disseisee. *Smith v. Tyn. et al.*, 2 Salk. 685. The doctrine of “descent cast” did not apply if the claimant was under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; because in all these cases there was no laches or neglect in the claimant, and therefore no descent took away his entry. Litt. 1–3, cap. 6. Nor did it affect copyhold or customary estates, where the freehold is in the land (*Doe d. Cook v. Danvers*, 7 East. 299); nor cases where the party has not any remedy but by entry as a devisee. 7 East. 321; Roscoe on Real Actions, 81–87; Adams on Ejectment.

A “*discontinuance in lands and tenements*,” is defined by Lord Coke to be “an alienation made or suffered by tenant in tail, or by any that is seised in *autre droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action and cannot enter.” Co. Litt. 325, a.

As to *Warranty*, see Com. Dig. *Guaranty*.

By Stat. 3 & 4 Will. IV. cap. 74, s. 14, Imperial Act in Revised Stats. of Ont. cap. 100, s. 2, “all warranties of land made or entered into by any tenant in tail thereof,

shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail."

11. Where any one or more of several persons entitled to any land or rent as co-parceners, joint tenants or tenants in common, have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them. C. S. U. C. cap. 88, s. 13.

This section is taken from 3 & 4 Will. IV. cap. 27, s. 12.

THE COMMON LAW.

Co-parceners, joint tenants, and tenants in common, having a joint possession and occupation of the whole estate, it was a settled rule that the possession of any one of them was the possession of the others, or other of them, so as to prevent the Statutes of Limitation from affecting them; nor did the bare receipts and profits of all the rents and profits by one operate as an ouster of the other. Co. Litt. 243, b, n, (1) 373, b: *Ford v. Grey*, 1 Salk. 285; 6 Mod. 44.

The possession of one co-parcener was that of the other, so as to carry a seisin in the other, and carry her share by descent to her heirs, although the other had never actually entered (*Doe d. Keen*, 7 T. R. 386); and entry by one co-parcener, when not adverse to her companions, enured to the benefit of all. Co. Litt. 243 b; *Doe d. Pearson*, 6 East. 173; Smith, 295.

But the possession of one heir in gavelkind was held not to be that of the other, where he entered with an adverse intent to oust the other. *Davenport v. Tyrrell*, 1 Bl. R. 675.

Where a tenant in common had been in the exclusive possession of the rents of S. for more than twenty years,

and an ejectment had been brought by another co-tenant in common, to which A. had taken defence, and on which no further proceedings were had, taking such defence is not conclusive evidence of adverse possession against A.'s co-tenant in common. *O'Sullivan v. McSwiney*, 1 Longfield & T. 111.

Since the passing of the Act 3 & 4 Will. IV. cap. 1, the possession of land by one co-parcener cannot be considered as the possession of his co-parcener, nor, consequently, can the entry of one have the effect of vesting the possession in the other. *Woodroffe v. Doe d. Daniel*, 15 M. & W. 792.

As to the retrospective nature of the Act, see *Culley, d. Doe v. Taylerson*, 11 Ad. & Ell. 1008; 3 P. & Dav. 538; *O'Sullivan v. McSwiney*, 1 Longfield & T. 118, 119; *Doe d. Holt v. Horrocks*, 1 Car. & K. 566.

This section applies not only to the case where one of several joint tenants has been in possession of the entirety of the whole of the lands held jointly, but also to the case where such tenant has been in possession of the entirety of any portion of such lands. *Murphy v. Murphy*, 11 Ir. C. L. R. 205, where *Tidball v. Jones*, 29 L. J. Exch. 91, is explained.

Lands were conveyed to a trustee, in trust for five persons. Four of the *cestuis que trustent* had for more than twenty years, by their agent, been in the exclusive enjoyment of the rents and profits. The trustee never interfered with the trust. *Held*, that the fifth tenant in common was barred, the case not being within the express trust clause of the Statute, as the defendants had not received the rents under, but in opposition to the trustee. *Burroughs v. McCreight*, 1 J. & Lat. 290.

Where two persons were in lawful possession of a copyhold, and the title under which they held came to an end, but they continued in possession for twenty-one years, it was decided that they held on as joint tenants, and inasmuch as

they had done nothing to sever the tenancy, the interest of the one who died first determined on his death. *Ward v. Ward*, L. R. 6 Chy. 789.

By the Revised Statutes of Ontario, cap. 105, s. 11, "whenever by any letters patent, assurance or will, made and executed after the first day of July, 1834, land has been or is granted, conveyed or devised to two or more persons other than executors or trustees in fee simple, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they are to take as joint tenants." C. S. U. C. cap. 82, s. 10. The same principle is laid down in the 37th section of the same Act.

12. Where a relation of the persons entitled, as heirs to the possession, or receipt of the profits of any land, or to the receipt of any rent, enters into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the persons entitled as heirs. C. S. U. C. cap. 88, s. 14.

This section is taken from 3 & 4 Will. IV. cap. 27, s. 13.

Reference is made to the section *infra*, "Possession among Relatives," page 24.

The effect of this section is illustrated in *Jones v. Jones*, 16 M. & W. 712.

PRIOR STATE OF LAW.

If a man seised of certain lands in fee had two sons, and died seised of such land, and the younger son entered by abatement into the land, the Statute of Limitations did not operate against the elder son, the younger having entered, as heir to the father, the same title as that of the elder son. Litt. s. 396; *Sharrington v. Shrotton*, Plowd. 306.

On proof that the sister of the plaintiff occupied the estate for twenty years, and that the defendant entered as her heir, her possession would be construed to be by curtesy

and license, to preserve the possession of the brother, and therefore not within the intent of the Statute 21 Jac. I. cap. 16. The presumption ceased, if it appeared that the brother had been in the actual possession, and had been ousted by the sister. *Page v. Selby*, Bull: N. P. 102; 2 Stark on Evidence, 220, second edition; see also *Lessee of Dowdall v. Bryne*, Batty's Ir. R. 373.

A. was possessed of lands for more than twenty years, and died in 1817. His widow had possession from that time until her death in 1838. B. was the eldest son of A. and his wife. It was held that although B. could not recover in ejectment as the heir of his father, because more than twenty years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as heir on her death in 1838. *Doe d. Bennett v. Longs*, 9 Car. & P. 773; see *Doe d. Draper v. Lawley*, 13 Q. B. 954.

This section changes the old law with regard to the possession of relatives. In the Ontario Courts, the following cases deserve attention: *Rumnell v. Henderson*, 22 C. P. 180; *Foster v. Emerson*, 5 Chy. 135; *Keffer v. Keffer*, 27 C. P. 257.

Noble v. Noble 25 Ont L.R. 379.

PART II.

REVISED STATUTES OF ONTARIO.

CAP. 108.

13. Where any acknowledgment of the title of the person entitled to any land or rent has been given to him or *to his agent* in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, such possession or receipt of or by the person by whom such acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or *to whose agent* such acknowledgment was given at the time of giving the same, and the right of such last mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one was given. C. S. U. C. cap. 88, s. 15.

Taken from 3 & 4 Will. IV. cap. 27, s. 14.

The cases cited here refer also to sections 19, 20, 21 and 23.

Four distinct cases in sections 13, 19, 23 and 17. In the whole four cases, if given *to the party or his agent*, the acknowledgment is binding; but an acknowledgment of title under the 13th section, or of the right to redeem under the 19th section, cannot be given *by an agent*, whilst in the case of money charges, and of arrears of rent or interest, an acknowledgment by an agent will be effectual.

This section provides that the acknowledgment must be signed by the person in possession; therefore an acknowledgment signed by an agent will be insufficient.

. Defendant's grandfather had been owner of two undivided thirds of a meadow, and held the other third under a lease which expired in 1818. Defendant's father and defendant succeeded in their turn; and at the time of the action defendant was owner of two-thirds and occupant of whole, no

rent having been paid since 1818. Plaintiff's only evidence was a letter of the land agent who managed defendant's property, within twenty years of action, in which he said that defendant "would no doubt accept a lease of Ley's one-third at a fair rack rent." *Held*, in ejectment for the one-third, that this was not a sufficient acknowledgment within section 14 (a), as not being signed by the person in possession, but only by an agent; and also that the letter was no evidence of a tenancy at will on the part of the defendant. *Ley v. Peter*, 2 H. & N. 101; 6 W. R. 437.

It was *held* that the unaccepted proposal for a lease, made by E. F., whose personal representative the defendant was, to the parties from whom the lessors of the plaintiff derived title, such proposal having been signed by a third party *for and in the presence of E. F.*, who was unable to write from illness, was evidence of an acknowledgment of title within the 14th section (b). *Corporation of Dublin v. Judge*, 11 I. L. R. 9.

The acknowledgment of the widow of the deceased squatter in possession was considered sufficient in the following case: *Canada Co. v. Douglass*, 27 C. P. 339.

In February, 1853, after the expiration of a lease by the plaintiffs to R. for ten years, R. continued in possession; and in 1854, defendant, who had married R.'s daughter, came to reside with R. under a verbal agreement, as he asserted, whereby R. handed over the possession to him; but the evidence shewed that R. still remained on the place until his death in 1860. After R.'s death, his widow and defendant continued to reside on the premises, but the defendant was frequently absent, working for others. In 1862, while defendant was so absent, and the widow alone in actual visible possession, S., the plaintiff's agent, entered, and the widow signed a written instrument, witnessed by S., confessing that she was on the land merely on sufferance

(a) Refers to Imperial Statute.

(b) *Ibid.*

of the plaintiffs, and undertaking to give them possession whenever they might require it. Afterwards defendant returned to the premises, and in 1866 the plaintiff brought ejectment. *Held*, that the plaintiff's entry, and the acknowledgment signed by the widow in 1862, put an end to defendant's former possession, if any, so that the Statute of Limitations would run only from that period; and that they therefore were not barred.

This case was tried before Moss, C. J., at the Ottawa Fall Assizes of 1876, and verdict for defendant. Rule obtained by C. Robinson, Q.C., to enter a verdict for plaintiff.

On shewing cause, J. W. W. Ward cited: Evan's Statutes, 3rd edition, Vol. IX., p. 452; *Butler v. Church*, 16 Grant, 205, 18 Grant, 190; *Trusdale v. Cook*, 18 Grant, 532; *Davies v. Henderson*, 29 U. C. R. 345; *Hyland v. Scott*, 19 C. P. 165; *Butterfield v. Maybee*, 22 C. P. 230; *Mulholland v. Conklin*, 22 C. P. 372; *Cahuac v. Scott*, 22 C. P. 551; *Dundas v. Johnston*, 24 U. C. R. 547.

In support of the rule, Mr. Robinson cited: *McKinnon v. McDonald*, 13 Grant, 152; *McMaster v. Morrison*, 14 Grant, 138.

Judge Gwynne, in delivering the judgment of the court, said: "A person having title has the possession in law and in fact, although neither by himself nor another in actual visible possession; but if a wrong-doer be out of actual possession for any length of time, however short, and during such absence the true owner enters upon the land, *he* becomes, as I apprehend, beyond all doubt reinstated in the possession of his former estate, and the time running under the Statute of Limitations becomes interrupted."

Whether the widow was not the agent of the defendant is in reality the question in this case. That she *was*, probably was the view taken by Moss, C. J. Reference made to *Clements v. Martin*, 21 C. P. 512; *Randall v. Stevens*, 2 E. & B. 641; wherein the principles of the decision of the Court of Common Pleas were laid down.

A verbal acknowledgment of title made during the twenty years will not save the Statute. *Doe d. Perry v. Henderson*, 3 Q. B. 486; *McDonald v. McIntosh*, 8 Q. B. 388; *McIntyre v. The Canada Co.*, 18 Chy. 367.

An acknowledgment in writing after the twenty years, will not revive a title which the twenty years' possession had extinguished. *Doe d. Perry v. Henderson*, 3 Q. B. 486; *McIntyre v. Canada Co.*, 18 Grant, 367.

Where A. had been twenty years in possession, a conveyance by B. to A. within the twenty years, of part of the lot in dispute, would not save the Statute, there being no written acknowledgment on the part of A. of B.'s title; and the fact of A. paying the taxes by B.'s direction, is no bar to the Statute. *Doe d. Perry v. Henderson*, 3 Q. B. 486.

A notice to quit from C. to B., within the twenty years, does not save C. from being barred by the Statute. *Doe d. Ausman v. Minthorne*, 3 Q. B. 423.

Nor a judgment in ejectment, recovered by C. against B. within twenty years, but upon which B. had never been dispossessed. *Doe d. Perry v. Henderson*, 3 Q. B. 486.

The plaintiffs claimed title through R., one of the children and devisees of C. The defendant claimed through R. and the other devisees of C., and by length of possession. C. died in 1843, having by his will, made in 1841, devised this land to his children in fee. R. died in 1851. Neither she nor any one in her behalf had any possession since 1848. It was proved that in 1848 one F., who was then on the lot, and through whom defendant claimed, told one M. that he had R.'s share of the lot, and was to pay the rent to C., the solicitor for the plaintiffs in a Chancery suit brought by F., and by R. and other plaintiffs, for partition of C.'s property on account of the costs of this suit; and that he afterwards told the eldest son of R. in 1850, who went to him for rent, that he kept it back to pay the costs. It also appeared that F. had paid money about 1857 to the town agent of C. in that suit on account of the costs. It was

sworn, however, that F. occupied under a brother of R. whose right he had purchased, not under R., and no lease was proved from R. nor any authority from her for the payment to C. *Held*, Wilson, J., dissenting, not sufficient evidence of payment of rent to R., to take the case out of the Statute. *Ruttan et al. v. Smith*, 35 Q. B. 165.

The defendant, in a bond to F. dated in 1856, recited that he (defendant) had bought in the estate of all the owners of this lot, except the estate of the family of F. and of such other of the claimants as were under disability, which class would include the plaintiffs, which defendant was to get in: and an agreement in writing was made between F. and another and the defendant, in 1855, by which defendant agreed to buy in all the interest of the children of the late C. in this lot. *Held*, not an acknowledgment under the Statute, not being given to the plaintiff or their agent. *Ruttan et al. v. Smith*, 35 Q. B. 165. See also *Fursden v. Clegg*, 10 M. & W. 572; *Goode v. Job*, 28 L. J. Q. B. 1.

When a mortgagor wrote to the mortgagee, in answer to the demand for payment, "I will comply with your request as to the repayment of \$500 I borrowed from you so many years ago, and until I pay the money I will execute anything you wish me to do for its security;" and there was evidence shewing that the only money ever loaned to the mortgagor by the mortgagee was the sum so advanced on the mortgage, it was *held* sufficient to take the case out of the Statute. *Barwick v. Barwick*, 21 Chy. 39.

An acknowledgment to a party's trustee is sufficient to take the case out of the Statute. *McIntyre v. Canada Co.*, 15 Chy. 367. Also *Williams v. McDonald*, 33 Q. B. 423; *Canada Co. v. Douglass*, 27 C. P. 339.

WHAT IS AN ACKNOWLEDGMENT?

Whether a writing amounts to an acknowledgment of title within this section, is a question for the judge and not for the jury to decide. *Doe d. Curzon v. Edmonds*, 6 M. & W. 295; *Morrell v. Frith*, 3 M. & W. 402.

Where letters were relied on as an acknowledgment of title, Sir E. B. Sugden, L. C., said it was a question of fact for a jury, whether the letters in question amounted to an acknowledgment of title within the Statute. *Incorporated Society v. Richards*, 1 Dru. & War. 290. See, however, Sugden's R. P. Stats. 67.

By an indenture, dated 27th October, 1827, between the defendant of the one part and the plaintiff of the other part, after reciting that certain copyhold premises were surrendered to the plaintiff for securing the repayment of £300, by him that day lent to the defendant, the plaintiff covenanted, on repayment of that sum and interest on the 27th April, 1828, to surrender the premises to the defendant, and the defendant covenanted to pay the £300 and interest at the time appointed for payment. There was also a stipulation that in default of repayment the plaintiff might take possession of the premises. The deed was in fact executed on the 23rd of August, 1834. No principal, interest or rent had ever been paid by the defendant. In February, 1854, the plaintiff brought ejectment. It was *held* that the deed was a sufficient acknowledgment of the plaintiff's title within this section, as the deed was to be read as speaking from the time of its execution, and consequently there was a sufficient acknowledgment to prevent the right of entry being barred. *Jayne v. Hughes*, 10 Exch. 430; 24 L. J. Exch. 113.

A correspondence by a party in possession of property with the solicitor of a society, by which he merely professed to hold the estates until an account on the foot of charges to which he was entitled should be closed, and offered to refer to arbitration all questions touching such account, as the only matter in dispute, was *held* to amount to a written acknowledgment of the plaintiff's title, and save it from being barred. *Incorporated Society v. Richards*, 1 Connor & Lawson, 86; 1 Dru. & War. 258.

Where two parties are dealing with each other, the one claiming a right to the property and the other an encumbrance on it, the encumbrancer cannot be heard to say that an acknowledgment, contained in a correspondence between them, is not binding on him, because there might be an infirmity in the title acknowledged in case some third person were to make a claim. *Incorporated Society v. Richards*, 1 Connor & Lawson, 86; 1 Dru. & War. 258.

Where a written promise to pay a debt barred by the Statute of Limitations has been lost, oral evidence of the contents of the writings may be given. Such a promise, if conditional, must be declared on as such. "If the action had been brought within six years, this letter would have been evidence of the acknowledgment of the debt, and would have supported the action. A promise to pay, whether absolute or conditional, does necessarily include an acknowledgment of the debt; and where the defendant is charged on his original liability, he cannot limit the effect of any acknowledgment which he makes by adding to it any new condition. But where the action is brought after six years, and the subsequent acknowledgment of the defendant is the very ground of his action, the plaintiff must take it altogether as he finds it, and cannot use the acknowledgment without annexing the qualification also." *Haydon v. Williams*, 7 Bing. 163.

If a person through whom the defendant in an action of ejectment claims has, in an answer sworn by him to a bill filed by the plaintiff in reference to the same property, acknowledged the title of the plaintiff within twenty years of the action being brought, such acknowledgment will be evidence against the defendant, and will operate as a bar to the Statute of Limitations under this section. *Goode v. Job*, 28 L. J. Q. B. 1; Ell. & Ell. 6.

In action for the use and occupation of premises alleged to have been held by the defendant as tenant to the plaintiff's testator, who died in 1837, the defendant pleaded the Statute of Limitations. A letter, dated August 30th, 1837,

after the testator's death, in answer to an application by the attorney for payment of the arrears of rent, was held sufficient acknowledgment to take the case out of the Statute. This letter stated: "It appeared reasonable that the plaintiff should vindicate his right to the land, rather than that the expenses should fall on the tenants." The letter concluded by stating that "the writer begged compassion, mercy and pity, and recompense in a satisfactory manner." *Finsden v. Clegg*, 10 M. & W. 572.

The moment after an acknowledgment of title within the meaning of the present section is made, the time begins to run against the person to whom it is made. *Burroughs v. McCreight*, 1 Jones & L. 304; *Scott v. Nixon*, 3 Dru. & War. 404.

Here the Lord Chancellor (Sir E. B. Sugden) said: "Suppose a man to enter into possession by permission of the true owner, and without payment of rent, and to give an acknowledgment in writing of the title, from that moment the possession becomes adverse, and time begins to run, and instead of the true owner having the admission of title, upon which he may rest, the effect is the very reverse; the adverse possession in fact commences, and the Statute begins to run. The question is, can this Court compel a purchaser to take a title depending upon parol evidence of adverse possession? It was said in this case that the Statute of Limitations only operated as a defence, but never could be held to confer a title; and I was asked, Where or in whom was the legal title? I reply, that the Statute has executed a conveyance to the party whose possession is a bar. The Statute makes the title, for by its operation it extinguishes the right of one party, and gives legal force and validity to the title of the other, the party in possession."

In Darby's Statutes of Limitations, p. 290 (Darb. & Bos.), it is written: "From some observations of Lord St. Leonards (referring to above remarks), it would seem to be the opinion of his lordship, that the effect of giving an acknowledgment

within this section is immediately to set the time running against the person to whom it is given, even though it had not begun to run before the acknowledgment was made. It is, however, conceived that there is nothing in the words of the section to compel such a construction, which he naturally characterizes as singular, and which is contrary to the analogy of all similar provisions, whether in this Statute or in 3 & 4 Will. IV. cap. 42. It is apprehended that this section, being a proviso on what has gone before, only applies to cases which would come within the earlier sections, and that where it is said, that where an acknowledgment shall have been given the right of action shall have been deemed to have then first accrued, the natural construction is, not that *whenever* an acknowledgment is given the right of action must be deemed to have accrued, but that whenever the right would under other sections have been deemed to have previously accrued, and an acknowledgment is made, the right shall be deemed to have accrued at the time the acknowledgment is made and not before."

The reader's attention is called to the remarks of Chief Justice Robinson, in the case of *Doe d. Perry v. Henderson*, 3 Q. B. 496-7, as to adverse possession. On p. 500, it is said: "Repeated efforts may be made in successive actions (of ejectment) to recover upon a title, which has been adjudged invalid, *until a Court of Equity thinks fit to interpose.*" The question naturally arises, under the present Administration of Justice Act, whether it would be necessary to call in the assistance of a Court of Equity, or whether successive actions are allowable? (a)

Immediately after this section, in 3 & 4 Will. IV. cap. 1, s. 27, was inserted as follows: "That when no such acknowledgment as aforesaid shall have been given, before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the

(a) As to this point, *vide St. Michael's College v. Merrick, supra.*

right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest at any time within five years next after the passing of this Act."

With regard to acknowledgments in general, Mr. Banning, in his late work on the Statute of Limitations, 1877, p. 35, says as follows:

"The reason for a statutory bar to claims obviously fails when the existence and justice of such claims are from time to time admitted by the persons against whom they are made. We naturally find, therefore, that under most Statutes dealing with the subject, a sufficient acknowledgment will suffice, up to the time of such acknowledgment, to exclude the operation of the particular Statute, and, as it is conveniently termed, to 'set time running again.' And where such provision has not been expressly made in the Statutes, Courts, even at Common Law, have found themselves at liberty beneficially to imply such a qualification to the rigour of the Statute.

"Where there is a statutory bar, and there is a statutory exception to that bar, by an acknowledgment of a certain character, the acknowledgment must, to be effectual, be strictly in accordance with the wording of the Statute; and unfortunately, in the several Statutes affecting the subject, the requirements for a sufficient acknowledgment are very various, and, it may almost be said, different in each. In a case then where it is intended to rely upon the fact of an acknowledgment on the part of the defendant, to prevent his taking advantage of the bar of the Statute, it is necessary to consider carefully under what Statute that bar arose, and the particular wording of the exception provided by that Statute. Thus, under some Statutes an acknowledgment will be sufficient if it be made by and to an agent; in others, *by*, but not *to*, and in others again *to*, but not *by* an agent."

The present Statute seems to have followed the English Statutes in this particular. Thus, in section 13, an acknowledgment of the lawful owner's title, so far as concerns any land or rent, must be given *to him* or his agent, but not by the giver's agent. In section 23, with respect to lands and legacies, an acknowledgment may be given by the person by whom the same is payable, or his agent, *to* the person entitled thereto, *or his agent*. Such is the case also in section 17, with regard to arrears of rent and dower, so that a valid acknowledgment in these cases may be both given and received without the signature of the principals on either side.

But in section 19, which has reference to mortgages, an acknowledgment of the title of the mortgagor must be signed by the mortgagee or the person claiming through him, and given to the mortgagor or his agent.

“At Common Law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; but it is otherwise in cases under the Statute Law, which may require a personal signature. And this is so with the Statutes of Limitation. It was *held* in *Hyde v. Johnson*, 2 Bing. N. C. 776, that Lord Tenterden's Act, 9 Geo. IV. cap. 14, must be read in *pari materia* with the Statute of Frauds, and that upon the construction of these Statutes, the Legislature must be taken to have intended a personal signature. It must, however, be remembered that the Common Law rule *qui facit per alium facit per se* ought not to be restricted, unless the Statute expressly or by necessary implication requires a personal signature. *Per* Quain, J., in *Queen v. Justices of Kent*, L. R. 8 Q. B. 307.

“In all cases of acknowledgment, it is necessary to bear in mind the following requisites, and see whether they are to be found in the particular case :

“1. The acknowledgment made must be in terms sufficient.

“2. It must be made by the proper person.

“3. It must be made to the proper person.

“4. It must be made with the proper formalities (such as signature in writing), if any. And further, in cases affecting real property, where the right and not the remedy alone is destroyed, it must be seen that the acknowledgment is made before time has finally run in favour of the maker, so as to have made to him a statutory transfer of the property before his acknowledgment, in which case such an acknowledgment will be of no avail.” (a)

14. The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of this Act. C. S. U. C. cap. 88, s. 17.

This is taken from 3 & 4 Will. IV. cap. 27, s. 35.

Receipt of rent to be deemed the receipts of the profits of the land, *subject to the lease*.

A suit for the recovery of *mesne* rent and profits in equity is not a suit for recovery of arrears of rent within section 17, *supra*. *Per* Turner, L. J., *Hicks v. Sallitt*, 3 D. M. & G. 816.

The Statute of Limitations forms no bar to a claim against a mortgagee in possession for occupation rent. *Coldwell v. Hall*, 9 Chy. 110.

The plaintiff leased premises from the defendant at a rent of \$150 a year, covenanting to pay rent, &c., and it was added, “this lease will be void if the said plaintiff fail to perform this agreement.” *Held*, that the last clause would only make the lease voidable at the option of the lessor, not void; and that to entitle the lessor to determine the lease for nonpayment of rent, a formal demand was necessary. *Quære*: whether the words “this agreement” would apply to the covenant to pay rent? (b)

(a) Banning's Limitation of Actions, 37.

(b) *Faugher v. Burley*, 37 Q. B. 498.

It is laid down in Comyn's Law of Landlord and Tenant, 327, where the landlord is about to enter for a forfeiture for nonpayment of rent, the Common Law requires a previous demand of the rent due, with circumstances of great particularity, on the very day the rent becomes due, at a convenient time before sunset, &c., and that this demand must be made in fact, his claim being regarded *stricti juris*. "If, after this formal demand, the tenant refuses or neglects to pay his rent, the lessor's right to enter is complete."—Morrison, J.

The proper manner of taking accounts in the Master's office appears to be pretty clearly laid down by Vankoughnet, Chancellor, in the case of *Coldwell v. Hall*, 9 Chy. 110: "The Master has taken the account against defendant, with costs. This is wrong, for I take it to be the settled practice of the Court, up to this time at all events, that when a mortgagee enters, his money being in arrear, he is not liable to account for the rents received by, or chargeable against him with costs, until he is paid off in full."

"In this respect then the Master's report must be corrected, and the account will be taken in the ordinary way, allowing the mortgagee his principal and interest until sufficient rents have been charged against him to pay off the amount due him. When this has been done, he must account for the rents annually chargeable against him, with interest on each sum from the time it is so chargeable, as a mortgagee paid off is but a bare trustee of the estate for the mortgagor, and should not continue to hold it, or if he does, he must pay interest on the rental properly coming from it to the mortgagor." *Quarrell v. Beckford*, 1 Madd. 269; *Smith v. Pithington*, 1 De G. F. & J. 120; also, *Schofield v. Lockwood*, 8 L. T. N. S. 409.

15. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery

whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished. C. S. U. C. cap. 88, s. 16.

Taken from 3 & 4 Will. IV. cap. 27, s. 34.

Formerly the Statute of Limitations was only considered a bar to the remedy, and not an extinguishment of the right. This section extinguishes the right. See *ante*, and remarks thereon.

An acknowledgment in writing, after the twenty years, will not revive a title which the twenty years' possession had extinguished. *Doe d. Perry v. Henderson*, 3 Q. B. 486. See also, 1 Wm. Saunders, 283, n.; 2 B. & Ald. 413; 1 B. & Ald. 93; 1 Ld. Raymond, 422, as to the extinguishment of the right.

The old Statutes only barred the remedy, but did not touch the right; possession at all times gave a certain right, but under the new Act, when the remedy is barred, the right and title of the real owner are extinguished, and are in effect transferred to the person whose possession is a bar. *Incorporated Society v. Richards*, 1 Dru. & War. 289.

The effect of the Act is to make a parliamentary conveyance of the land to the person in possession after the statutory period has elapsed. *Per Park, B., Doe d. Sumner*, 14 M. & W. 42.

NATURE OF THE INTEREST ACQUIRED.

“It has been suggested that the title gained by a wrong-doer who has been in possession, which may be limited by rights yet remaining unextinguished, is commensurate with the interest which the rightful owners have lost by the operation of the Statute, and must therefore have the same legal character, and be freehold, leasehold or copyhold accordingly.” Darb. & Bos. Statute of Limitations, 390.

Mr. Hayes' view is as follows: “The wrong-doer must be considered according to the principle of the old law as claiming generally, and therefore as claiming the absolute

property (unless indeed he expressly qualify his claim), and the Statute as merely diminishing from time to time the danger of eviction, till at length his originally precarious fee becomes, by the exclusion of every stronger claim, a firm inheritance." 1 Hayes' Conv. 270, 5th edition. The latter view seems to be taken by Mr. Dart, Vend. & Purch. 370, 4th edition. See further, an article 11 Jur. N. S. 151, Part II. See also, in Ontario Courts, the remarks of Chief Justice Robinson in *Doe d. Perry v. Henderson*, quoted in remarks on section 13.

A simple procedure, whereby the possessor of land, by the extinguishment under the Statute of Limitations of the former owner's title, could obtain a patent from the Crown, is very much needed. "An eligible opportunity is now opened" for young legislators to distinguish themselves.

Before this Statute, twenty years' possession gave a *prima facie* title against every one, and a complete title against a wrong-doer, who could not shew any right, even if such wrong-doer had been in possession many years, provided they were less than twenty. *Doe d. Harding v. Cooke*, 7 Bing. 346. The effect of this section would be to give the right to the possessor for twenty years, even against the party in whom the legal estate formerly was, and but for the Act would still be, when he had not obtained possession till after the twenty years; but then it is apprehended that such twenty years' possession must be either by the same person, or by several persons claiming one from the other, by descent, will or conveyance. *Doe d. Carter v. Barnard*, 13 Q. B. 945; 18 L. J. Q. B. 306; *Doe d. Humphrey v. Martin*, 1 Car. & M. 32; *Doe d. Hughes v. Dyball*, 3 Car. & P. 610.

In *Doe d. Carter, &c.*, the lessor of the plaintiff relied on her possession for thirteen years, and her husband's before her for eighteen years, but in so doing shewed that her husband died leaving children. The defendant, in whom the legal estate was before the twenty years, had turned the lessor of

the plaintiff out of possession. It was *held*, first, that the possession of the lessor of the plaintiff not being connected by right with that of her husband, section 34 of 3 & 4 Will. IV. cap. 27, did not give her the right of possession against the defendant.

Though by this section the right is extinguished at the end of twenty years, still adverse possession by a succession of independent trespasses for a period exceeding twenty years, confers no right on any one of them who has not *himself* had twenty years' uninterrupted possession, except as formerly a defence to a trespasser in possession against an action by the rightful owner. *Dixon v. Gayfere*, 17 Beav. 421; 23 L. J. Chy. 60. It seems that in such a case the first adverse possessor might maintain an action against a subsequent possessor by whom he has been expelled. Dart, V. & P. 371, 4th edition; Darb. & Bos. Statute of Limitations, 392. See Canadian cases mentioned *infra*.

As to purchaser being compelled to accept a title depending on the Statute, see *Scott v. Nixon*, 3 Dru. & War. 388, and remarks on section 13.

In the case subsequent to *Scott v. Nixon* of *Tuthill v. Rogers*, 6 Ir. Equity Rep. 441, 1 Jones & L. 36, Sugden, L. C., observed that the above decision had been acquiesced in, and in conformity with it, he should be compelled in principle to adopt the same construction against the rights of the Crown, if the case came within the provisions of the Act 4 Geo. III. cap. 47, by which the right of the Crown is barred, and the estate actually transferred and vested in the person who has held adverse possession for sixty years. See *Lethbridge v. Hickman*, 25 L. J. Q. B. 84; *Moulton v. Edmonds*, 1 De G. F. & J. 250.

EXTINGUISHED TITLE CANNOT BE REVIVED.

The effect of this and the second section as to land, is that after (ten) years' possession, adverse to a title, it is extinguished, so that it cannot be revived or revested by

a re-entry after that period upon the doctrine of remitter, because such an application of that doctrine requires that the former title should be in existence at the time of the re-entry, and the express provision in the Statute, that no person shall be deemed in possession of lands merely by reason of an entry thereon, applies to cases of such re-entry. *Brassington v. Llewellyn*, 27 L. J. Exch. 297; 1 F. & F. 297.

Rights to rents extinguished by this section. Sugd. R. P. Stat. 9; *Hanks v. Palling*, 6 Ell. & Bl. 659.

Where a Statute of Limitations extinguishes the right, and does not merely bar the remedy, the defence under such action need not be pleaded specially, and therefore, in an action of replevin evidence of the lapse of twenty years since the last payment of rent may be given under a plea in bar of *non tenuit*. *De Bauvoir v. Owen*, L. J. 1850; Ex. Chy. 177; 5 Exch. 166; *Owen v. De Bauvoir*, 6 M. & W. 547.

The appointment of receivers in a suit in Chancery, at the instance of judgment creditors of a former owner, is not such an interruption of possession as will prevent an indefeasible title being acquired by an adverse possession for twenty years under this section. *Groome v. Blake*, 8 Ir. C. L. R. 428.

ARREARS OF DOWER, RENT AND INTEREST.

16. No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit. C. S. U. C. cap. 88, s. 18.

This section is taken from 3 & 4 Will. IV. cap. 27, s. 41.

In equity, as at law, there was before this Act no limitation to a claim of the arrears of dower. *Oliver v. Richardson*, 9 Ves. 222.

And though at law, by the death of the heir, the widow lost all arrears incurred in his lifetime (*Mordaunt v. Thorold*, 3 Lev. 375), yet in equity, if she had filed her bill before

the death of the heir, she was entitled to the *mesne* profits (*Curtis v. Curtis*, 2 B. R. C. C. 620) from the time her title accrued (*Dormer v. Fortescue*, 3 Atk. 130), provided that she had made an entry (*Tilling v. Bridger*, 2 Vern. 519; *Precedents in Chancery*, 252); and so, in case of her death, were her representatives. *Wakefield v. Child*, 1 Fonbl. Eq. 159, n.

AS TO FORM OF PLEADING.

That demandant's right to dower in the premises accrued to her more than twenty years before the commencement of this action. *McDonald v. McIntosh*, 8 U. C. Q. B. 388.

17. No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively has become due, or next after any acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. C. S. U. C. cap. 88, s. 19.

See McHugh v. Gibbons 24 O. A. 586

Taken from the 42nd section of the Imperial Statute of Will. IV., with regard to limitations.

A testator bequeathed his personal estate to his executrix and executors in trust for the purposes of his will, and he gave to them in the quality of trustees for the use of his son for life, and after his death for the use of his son's children or child, if there should be but one, "the sum of \$1,500, due to me by C., and secured by a certain mortgage," &c. *Held*, that the legatee was entitled to claim more than six years' arrears of interest, the trust being express, and the Statute therefore not applying to the case. *Loring v. Loring*, 12 Chy. 347.

Where a purchaser takes possession before conveyance, he is liable to interest from the time of taking possession, and the liability is not limited to six years. *The Great Western R. W. Co. v. Jones*, 13 Chy. 355.

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During the lifetime of a mortgagor, the mortgagee has no lien on the mortgaged property for more than six years' arrears of interest, though he may have a personal action on the covenant for more; but in this country, as well as in England, after the mortgagor's death, the mortgagee, to avoid circuity, may as against the heir tack to his debt all the interest recoverable on the covenant. *Carroll v. Robertson*, 15 Chy. 173.

A mortgagee sold the mortgaged property under a power of sale. *Held*, in a suit by the mortgagor (or subsequent mortgagee to account) for the surplus, that the mortgagee was entitled to retain arrears of interest for more than six years. *Ford v. Allen*, 15 Chy. 565.

This case of *Ford v. Allen*, with which the author was acquainted, was not a suit by a mortgagor, but was a suit by a subsequent mortgagee.

One Story was the owner of the farm he mortgaged to Allen and subsequently mortgaged to Ford. Allen sold under a power of sale, and a bill was filed by Ford to account, and to compel Allen to pay over to him all amounts over the six years' arrears of interest. The case was decided, following *Edmonds v. Waugh*, 1 L. R. Equity, 418, which was a different state of facts. Sir R. F. Kindersley, V. C., there says; "Moreover, *it (a)* does not appear to me to come within the spirit of the Act, which, it must be remembered, is an Act taking away existing rights, and which must be construed with reasonable strictness. The intention of the Legislature, I think, was that if a man choose to let interest run into arrear for more than six years, and then come to a court of justice to recover the interest, he should only be entitled to recover six years' interest; but it does not follow that the Legislature intended that a mortgagor who has lost his legal right, and comes to the Court insisting on his equity to redeem, should be allowed—

(a) *Mason v. Broadbent*, 33 Beav. 296.

although he has failed to pay the interest which he ought to have paid for more than six years—to redeem on payment only of six years' interest. There would be no justice in such a construction of the Statute. Is the omission of the mortgagor to pay the interest which he ought to have paid less culpable than the omission of the mortgagee to demand and enforce payment of it?"

In the case of *Ford v. Allen*, the argument may be met by asking—Is Ford, the subsequent mortgagee, to be compelled to lose everything, interest and his security, because Allen did not take proceedings and sell under his mortgage? Why should Allen receive more than six years' interest as between Ford (subsequent mortgagee) and himself?

A mortgage had been transferred to a trustee to secure certain notes of the mortgagee, one of which, after several years, was found in the hand of the assignee of the mortgage; and a suit having been instituted upon the mortgage by the trustee, it was *held*, that to the extent of the amount remaining due on the mortgage, including six years' interest, the party beneficially interested was entitled to recover the amount of the note, and interest the whole period the note had run. *Scatherd v. Rielly*, 22 Chy. 8.

Where a defendant desires to prevent the plaintiff from recovering interest for a longer period than six years, he must set up the defence of the Statute of Limitations; merely filing the usual disputing note is not sufficient for this purpose. *Wright v. Morgan*, 24 Chy. 457. Reversed on Appeal. See p. 121.

It is a question whether this last decision is good law, judging by analogy, and the principles enunciated in the Court of Appeals in the case of *Gilleland v. Wadsworth*.

In that case Chancellor Spragge, in the Court of Chancery, held that it was necessary to plead the Registry Laws. But the Court of Appeals held they would take cognizance of the Registry Laws, though the point on them was not taken in the pleadings. It has always been held that the

Courts will take cognizance of the Statute of Frauds, without it being pleaded. *Gilleland v. Wadsworth* holds they will act in a similar way by the Registry Laws; why they should not with regard to the Statute of Limitations, or any other public and general Statute, is difficult to understand.

The Statute of Limitations forms no bar to the claim against the mortgagee in possession for occupation rent. *Coldwell v. Hall*, 9 Chy. 110.

With regard to arrears of interest on an annuity, see *supra*.

The fourth section of this Act provides for the case where the right or title to an annuity is disputed; the seventeenth section where the title to the annuity is *not* disputed, but the distress is made for the arrears due. *James v. Salter*, 3 Bing. N. C. 552. *Vide Allan v. McTavish, supra*.

An annuity charged on land by will comes within the meaning of the word rent in the third sub-section of section 2 of the interpretation clause, and therefore no more than six years' arrears are recoverable. *Ferguson v. Livingstone*, 9 Ir. Equity Rep. 202; *Francis v. Grover*, 5 Hare, 39. But in *Wheeler v Howell*, 3 K. & J. 189, arrears of annuity charged on reversionary interest in land were held to be recoverable more than six years after the same became payable. See, however, *Vincent v. Goring*, 1 J. & Lat. 697; *Sinclair v. Jackson*, 17 Beav. 405. An annuity bequeathed out of personalty is not within this section, but is within section 23, *supra*. *Roch v. Cullen*, 6 Hare, 531. *Re Ashwell's Will*, Johns. 112. Lord St. Leonards considers that the words in this section, "arrears of interest in respect of any legacy," might well be held to include an annuity which is payable out of personalty, and no charge upon the land. R. P. Stats. 138.

It has been held in several cases in England that in a foreclosure suit a mortgagee cannot recover more than six years' arrears of interest, although the mortgage debt is secured by covenant. *Sinclair v. Jackson*, 17 Beav. 405;

Shaw v. Johnson, 1 Drew. & Sm. 412; *Round v. Bell*, 30 Beav. 121. The case is different where there is a trust to secure the money.

These cases are all mentioned in the able judgment of Moss, C. J., in *Allan v. McTavish*, *supra*. *Vide* notes on section 23.

18. Where any prior mortgagee or other encumbrancer has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit is brought by any person entitled to a subsequent mortgage or other encumbrance on the same land, the person entitled to such subsequent mortgage or encumbrance may recover in such action or suit the arrears of interest which have become due during the whole time that such prior mortgagee or encumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years. C. S. U. C. cap. 88, s. 20.

Latter part of section 42, 3 & 4 Will. IV. cap. 27.

This section is founded on the principle that, as the prior mortgagee was in possession and received the profits of the land, he should be accountable for the interest in the account for the whole time, although it exceeded the six years. He cannot hold the land and receive the profits, and then set up the Statute of Limitations to prevent interest being recovered after six years. He “cannot eat his cake and have it.”

The same principle holds in ascertaining the measure of damages, as decided in the case of *Colton v. Morton*, and in many other cases.

In *Colton v. Morton*, plaintiff sold shares in a road company to defendant for a certain price, and was always willing to transfer the shares and receive the money. Under the company's rules, in order to transfer the shares, defendant had to accept them by signing the books of the company. Defendant would not accept them, and while the plaintiff held, he brought an action on the contract to recover the contract price. It was *held* by the Courts that

plaintiff could not hold the shares and recover the money too; his course was to sell the shares, and bring an action for the difference between what they sold for and the contract price.

It is presumed that a squatter would not be an encumbrancer within the meaning of the Statute. But see *Doe d. Johnson v. Liversedge*, 11 M. & W. 517, where it is stated, "The recovery contemplated by that section not being necessarily a recovery by virtue of legal process."

The exception in this section is, where a man has an estate and there are several encumbrances on it, and one of the encumbrancers enters into possession, then another creditor shall not be prejudiced by that possession, if he come for relief within a year after the prior creditor has been removed from the possession. If a prior mortgagee or other encumbrancer is in possession, the right of the subsequent creditor to recover interest during the full period of such possession, although that period may exceed six years, is saved, provided he is so vigilant as to come within one year after the determination of that possession. A judgment creditor, who has the first security upon the estate and gets into possession, is a prior encumbrancer in possession within this proviso. *Henry v. Smith*, 2 Dru. & War. 390. The prior encumbrance referred to in this exception is one which affects the estate or interest upon which the subsequent encumbrance is also a charge. *Vincent v. Goring*, 1 J. & Lat. 697.

A. being entitled to a mortgage on certain lands vested in a trustee for him, agrees that a subsequent annuity creditor should have precedence over his debt, and joins in a demise of the lands to a trustee for the annuitant, but his trustee who had the legal estates did not join in the demise. A. remains in possession till the death of the grantor of the annuity. It was *held* that the annuitant was not debarred from recovering more than six years' arrears, as the annuitant fell strictly within the literal terms of the

exception in this section. *Drought v. Jones*, 2 Ir. Eq. Rep. 303; "a doubtful authority."—Sugd. R. P. Stat. 146, n. See also *Montgomery v. Southwell*, 2 Con. & Law. 263; *Wheeler v. Howell*, 2 Kay & John. 198.

Sugden says: "As we have seen, a judgment creditor of a remainder-man in fee has been allowed to recover only six years' interest, although the tenant for life or his encumbrances have all along been in possession.

"The Court observed that this was a case of a totally different nature from that provided for by the Statute, for here was an estate for life not barred by the judgment, and a remainder which was barred by it; the case therefore was not within the exception, for the judgment creditor of the remainder-man had no right to enter into the possession of the estate during the life of the tenant for life, even supposing the possession had been vacant. The Act does not say that if the creditor could have had a remedy against the lands, and neglected to avail himself of it, he shall only recover six years' interest, but it is absolute and positive that no arrears of interest shall be recoverable but within the time specified; and then the exception states the only case in which the Legislature intended to relieve the creditor from the effect of the previous enactment."

A second mortgagee as such cannot impeach a prior registered mortgage as fraudulent and void against creditors, but a judgment creditor having accepted a mortgage, does not lose his rights as a judgment creditor. *Warner v. Taylor*, 8 L. J. 243.

MORTGAGES.

19. Where a mortgagee has obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage, but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, has been

Martin v Evans 12 QWR. 52 - As soon as mltge becomes in default & the mltgee becomes entitled to possn, he must be deemed to be in possn, unless the contrary can be shown.

given to the mortgagor or some person, claiming his estate, or to the agent of such mortgagor or person, signed *by the mortgagee*, or the person claiming through him ; and in such case no such action or suit shall be brought, but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given. 38 Vic. cap. 16, s. 8.

Taken from 3 & 4 Will. IV. cap. 27, s. 28.

A letter, "I will comply with your request as to the repayment of \$500 I borrowed from you so many years ago, and until I pay the money I will execute anything you wish me to do for its security," was held sufficient acknowledgment. *Barwick v. Barwick*, 21 Chy. 39.

The Provincial Statute 13 & 14 Vic. cap. 61, s. 1 (Revised Statutes 117, s. 1), provides as follows :

In all actions—

(a) Of account, and, upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants ;

(b) On simple contract, or of debt grounded upon any lending or contract without speciality ; and,

(c) Of debt for arrearages of rent, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Act passed in England in the twenty-first year of the reign of King James the First, respecting such actions as aforesaid, or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable thereby or by his agent duly authorized to make such acknowledgment or promise. C. S. U. C. cap. 44, s. 2 ; 26 Vic. cap. 45, s. 8.

When the mortgagor is in possession, a mortgage may be presumed satisfied after twenty years from the payment of the mortgage money. *Doe d. McGregor v. Hawke* ; *Doe d. McGregor v. Crow*, 5 O. S. 486.

Under the old Statute of Limitations, 21 Jac. I., the possession of the mortgagor, when not adverse, would bar the mortgagee. *Doe d. Dunlop v. McNab*, 5 Q. B. 289.

When the mortgagee has neither taken possession of the land after default, nor received interest within twenty years, the title is in the mortgagor, and the mortgagee in ejectment against a third party may be nonsuited. *Doe d. McLean et al. v. Fish et al.*, 5 Q. B. 295.

Where there has been no redeemer to the mortgagor until default, and the land is vacant at the execution of the mortgage: *Semble*, that the mortgagee being under such an instrument deemed in possession of the land by operation of law, the presumption of payment after twenty years does not arise even though the mortgagee has never made any actual entry, nor received any payment on account.—A. Wilson, J., dissenting.

The mere fact that the mortgagee is barred by the Statute of his remedy on the covenant for the money, will not establish a payment so as to reconvey the legal title to the mortgagor. *Mahar v. Fraser et al.*, 17 C. P. 408.

A mortgagee, having obtained possession by ejectment, has a good title after twenty years, notwithstanding that during these years an administration order of the person, not being the mortgagor entitled to the equity of redemption, has been obtained. *Crooks v. Watkins*, 8 Chy. 340.

A suit of foreclosure, or for the sale of mortgaged premises in default of payment, is not a suit for the recovery of lands, but is a proceeding for the recovery of money due upon land within sec. 24 of C. S. U. C. cap. 88; *Barwick v. Barwick*, 21 Chy. 39.

In *Allan v. McTavish*, a summary of which is reported in the Law Journal of Ontario, July, 1877, p. 197, it is decided that the recovery of money on a covenant in a mortgage after ten years, is barred by the present Statute under revision.—Morrison, J.

Second mortgage barred when 1st mortgagee has had possession.
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Reported more fully in 41 Q. B. 567. This case was reversed on appeal, *vide supra*, sec. 23, p. 104.

The reader will remember that under the operation of the present Statute, the cases here which refer to twenty years' possession, relate at present to ten years' possession, etc.

An acknowledgment by an executor will take a debt out of the Statute, as against all parties beneficially interested. (a)

Such is the law in England, though it appears to be otherwise in America (b). And indeed the contrary view which is there held might seem more consistent with the modern theory of acknowledgment, which is, as we have seen, that it must amount to a new promise; for such a new promise by an executor would seem to be, on principle, invalid against him.

Would the Ontario Statute (Revised Stats. cap. 107 s. 29), in which "executors are allowed to pay debts, accept compromises, and compound the same," give the power to executors of a mortgagee by express Statute to give such an acknowledgment as would take the case out of the Statute of Limitations in favour of the mortgagors for (amongst other reasons) the absence of a moral consideration to support it?

In the case of *Fritry v. Thomas*, 1 Whart. Penn. 66, it is expressly held by the Supreme Court of Pennsylvania that an executor may plead the Statute of Limitations, although he may have given an acknowledgment which would have let in the Statute had it been his own debt. The Ontario decisions on this point appear to follow the English rather than the American principle.

Eccles et al v. Maxwell, 17 Q. B. 173, was as follows: Ejectment. The plaintiff claimed under the grandson and

(a) Per Lord Cranworth in *Toft v. Stephenson*, 1 De G. M. & G. 41; *Fordham v. Wallis*, 10 Hare, 217; 22 L. J. Chy. 548; *Browning v. Paris*, 5 M. & W. 120.

(b) Angell, 266.

heir at law of the patentee, F. Drouillard; defendant under his second son, Dennis; to whom it was alleged that he had conveyed. The patent was for 1,200 acres, including the land in question. Dennis demised this with other lands among his children, who by partition conveyed it to one of them, J., who afterwards demised to his brother R. R. died, and his land was sold under a judgment obtained against C., his wife, on a confession given by her as *his administratrix*, and was purchased by her at the sale and conveyed to the defendant. *Held*, that the fact of C. being administratrix could not be impeached so long as the letters of administration granted to her remained in force; and that she could legally give the confession she did, and purchase under the judgment obtained on it against herself, though it might furnish grounds for suspicion of fraud.

In order to bind the estate, an acknowledgment made by an executor must be in his representative character. (a)

In England, where persons acting in the double capacity of executors and of trustees of real estate, made payments which amounted to an acknowledgment of a debt in their character of executors, it was *held* not to revive the liability against the real estate (b); and it may be noticed that in such cases no principle of marshalling exists" (c). But see *Chisholm v. Barnard*, 10 Chy. Ontario, 479. Where executors, without any authority, assumed to manage the real estate, they were made to account for their acts as if they had been duly empowered as trustees.

The reason is not apparent why the mortgagee should not be allowed to make an admission (in writing, signed by himself) of his mortgage title to a third person, of which the mortgagor may have the benefit. The Statute, however, requires that the admission should be made to the mortgagor or his agent, and by that the Court is bound. *Batchelor v. Middleton*, 6 Hare, 83, 84.

(a) *Tulloch v. Dunn*, Ryan & Moody, 416.

(b) *Fordham v. Wallis*, 10 Hare, 217; 22 L. J. Chy. 548.

(c) *Ibid*; Banning's Limitation of Actions, p. 229.

It was said that it was not necessary, to make a person an agent to receive an acknowledgment, that he should have an actual authority to act. It was sufficient that the grandfather acted as the agent of his grandchild, and that she, when she came of age, adopted what he had done on her behalf. *Truelock v. Roby*, 12 Sim. 402.

It was questioned whether, since the Statute 3 & 4 Will. IV. cap. 27, the bar created by twenty years' possession by a mortgagee is defeated by his having kept accounts of the rents received by him. *Baker v. Whetton*, 14 Sim. 426. But it is observed by Sir E. Sugden (Real Property Statutes, p. 117, 2nd Edit.), "that keeping accounts could hardly be held to supply the want of an acknowledgment; for during the twenty years prudence would require that an account should be kept, and after that period, when the right to redeem is barred, no one has a right to inquire how the *owner*, though formerly a mortgagee, has kept his accounts." The Statute intended to put an end to such inquiries.

There are no savings for disabilities of the mortgagor or his heirs in regard to the bar created by this section. Sugd. R. P. Stats., p. 118, pl. 42, 2nd Edit.

A husband separated from his wife, becoming mortgagee in possession of her separate estate for twenty years, cannot set up the Statute of Limitations. *Book v. Purser*, 1 Ir. Eq. Rep. 33. A solicitor who pays off a mortgage debt due from a client must be taken to act as the agent of the client; and if he receive the rents of the mortgaged property, the possession is that of the client, and time will not run against the client. *Ward v. Cotter*, L. R., 1 Eq. 29. A trust for sale of land by way of security for money lent is a mortgage within this section.

See also the following cases with regard to acknowledgments:—*Hyde v. Dallaway*, 2 Hare, 528; *Rafferty v. King*, 1 Reen. 601. Also, *Alderson v. White*, 2 De G. & J. 109, where Lord Cranworth said: "I am disposed to think that the Statute cannot apply so as to make the mere possession

by the mortgagee for twenty years, without acknowledgment, a bar to redemption, where the original contract is in terms that the mortgagor may redeem at any time during a period extending beyond the twenty years.”

A mortgagee who holds property in pledge is responsible for it in his integrity. *Hood v. Easton*, 2 Griff. 692.

In a case which was decided under 3 & 4 Will. IV. cap. 27, more than twenty years after a mortgagee had entered into possession, the mortgagor's solicitor wrote to the mortgagee, requesting to know when he could see the mortgagee on the subject of the mortgage. The mortgagee replied by a letter, saying: “I do not see the use of meeting unless some one is ready to pay me off.” It was *held* that the letter was a sufficient acknowledgment in writing to exclude the application of the Statute of Limitations, although not written within twenty years after the mortgagee had entered into possession. *Stansfield v. Hobson*, 3 De G. M. & G. 620; Darb. & Bos., Stat. Lim. 364.

20. In case there are more mortgagors than one, or more persons than one claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons. 38 Vic. cap. 16, s. 9.

This is the second clause of 3 & 4 Will. IV. cap. 27, s. 28.

Vide Barwick v. Barwick, 21 Grant, 39.

There is a great difference between the 20th section and the 21st. In the 20th an acknowledgment given to any mortgagor, &c., shall be as effectual as if the same had been given to all such mortgagors; but in the 21st section it is laid down that such acknowledgment given by a mortgagee shall only bind the party giving the same.

“There are no savings for disabilities of the mortgagor or his heirs, in regard to the bar created by this section. Where the mortgagor is constructively tenant at will to the mortgagee, the time does not begin to run against the mortgagee

till the tenancy is determined. An acknowledgment by one only of two joint mortgagees is wholly inoperative." Shelford's Statutes, 216.

Attention is called to Rev. Stats. cap. 66, ss. 35, 36, 37, 38, which embrace the provisions with regard to sales of equity of redemption, and to the cases of *Skæ v. Chapman*, 21 Grant, 534; *McEvoy v. Clone*, 21 Grant, 515, in which last case the sale by the sheriff of lands of mortgagor, in a suit against the executors of the mortgagor, was held to be valid.—Proudfoot, V. C., dissenting. *Vide* also, with regard to acquiescence, notes on section 33.

21. In case there are more mortgagees than one, or more persons than one claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him, or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as have given such acknowledgment are entitled to a divided part of the land or rent comprised in the mortgage or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent bears to the value of the whole of the land or rent comprised in the mortgage. 38 Vic. cap. 16, s. 10.

This section is the last part of section 7 of 37 & 38 Vic. cap. 57, Imperial Statutes, and the whole section, which we have divided into three parts, was substituted by the operation of the 9th section of the same Act for the 28th section of the Statute of Limitations of 3 & 4 Will. IV. cap. 27. "No special provision was made by that Statute for the case

of a mortgagee out of possession. A doubt suggested by Mr. Justice Patteson in *Doe d. Jones v. Williams*, 5 A. & E. 291, as to whether the mortgagee must enter or obtain a written acknowledgment of title to prevent his right being barred, notwithstanding the payment of interest to him by the mortgagor, led to the passing of 7 Will. IV. and 1 Vic. cap. 28." (a)

In our Statute we have incorporated the short provisions of that Statute in section 22, the next following section.

An acknowledgment of a mortgagor's title given by one only of two joint mortgagees, who were, on the face of the mortgage deed, shewn to advance the money on a joint account as trustees, was held wholly inoperative. "The provision in this section as to acknowledgment by some of several mortgagees apply only where they have separate interests either in the money or the land." *Per Mellish, L. J., Richardson v. Yonge*, L. R. 6 Chy. 478.

If a mortgagee retains possession of the property after being paid in full, the general rule is to charge him with interest and rents in respect of his subsequent receipts; *a fortiori* is such a charge proper where a mortgagee resists the mortgagor's right to redeem. 15 Chy. 568.

In a redemption suit by the second mortgagee against the first, it appeared that the equity of redemption had become vested in the first mortgagee, and that he had entered into possession and had cut and removed timber to a greater value than the amount due on his mortgage. *Held*, that he was bound to account for the value of such timber and occupation rent as was taken or received by him as mortgagee, not as owner of the equity of redemption, but that the second mortgagee might ask for a receiver. *Steinhoff v. Brown*, 11 Chy. 114.

One of several devisees claimed to be solely entitled, and mortgaged the property. The mortgagees entered into the

(a) Charley's Real Property Acts, 47.

receipts of the rents. *Held*, that they must account to the other devisees for their shares of the rents. *McIntosh v. Ontario Bank*, 19 Chy. 155.

The holder of a mortgage went to reside with his sister, the widow of the mortgagor, upon the mortgaged premises, but asserted no claim or right to possession as mortgagee until some years afterwards, when the widow, being about to marry, desired her brother to leave. The brother was charged with occupation rent from that period, not from the time of his going to reside on the property; and such assertion of right had not the effect of referring back his possession to the time when he first acquired the right, or went to reside on the property. *Paul v. Johnson*, 12 Chy. 474.

When the plaintiff (a mortgagee) is in occupation of the mortgaged premises, the Master should charge him with occupation rent up to the day appointed for payment; so where it appeared that a mortgagee under such circumstances had been charged with occupation rent up to the date of the Master's report, and had since continued in possession, the final order for foreclosure was refused. *Pipe v. Shafer*, 1 Chy. Chambers, 251.—Spragge.

Although the rule is, that where a mortgagee enters into possession, he does so for the purpose of recovering both his principal and interest, and the estate is a security only for the money due on the mortgage, and the Court requires him to be diligent in realizing the amount due, in order that he might restore the estate to the mortgagor, who is in equity the party entitled to it; still he will not be held responsible for any greater rent than he has actually received, unless it is clearly established in evidence that he knew a greater rent might and could have been obtained, and that he refused and neglected to obtain the same. *Merrian v. Cronk*, 31 Chy. 60.

22. Any person entitled to or claiming under a mortgage of land may make an entry or bring an action at law or suit in equity to

recover such land, at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry, or bring such action or suit first accrued. 38 Vic. cap. 16, s. 12. *Camron v. Bachu*

34 Ch. 227 7 App. 235. *20-19 Q.R. 226 &*
This section is taken from Imperial Statute 1 Vic. cap. 28. *Cass v. A.*

There was alarm created among mortgagees, on account of the doubt which arose in *Doe d. Jones v. Williams*, 5 Ad. & E. 291, whether it was necessary for a mortgagee not taking possession of the property mortgaged, to bring his action within twenty years from the day of default in paying the mortgage money independent of payment of interest or principal. This caused the passage of the present section in England. *Deerman v. Wyche*, 9 Sim. 570.

“The beneficial saving of this enactment is, it will be seen, confined to *land* as defined by section 2 of the present Act. The object of this restriction is not clear; rent charges may be and sometimes are the subject of mortgage; and it is hard to point out why mortgages of land (including tithes) should, by receiving interest, retain their right to bring an action to recover such land (or titles), which does not equally hold good in favour of the right of a mortgagee of a rent charge to recover such rent charge by distress. It may, however, be considered pretty clear that receipt of interest on a debt secured by a mortgage of rent charge, will *not* have the effect of keeping alive the right of the mortgagee to distrain for the rent charge on the land out of which it issues.” (a)

For cases decided on the 7 Will. IV. and 1 Vic. cap. 28, see *Doe d. Palmer v. Eyre*, 17 Q. B. 366; *Eyre v. Walsh*, 10 Ir. C. L. R. 346; *Ford v. Ager*, 2 H. & C. 279; *Doe d. Baddeley v. Massey*, 17 Q. B. 373; *Chinney v. Evans*, 11 H. L. 115; *Wrixon v. Vyse*, 2 Dru. & War. 192; *Loftus v. Swift*, 2 Sch. & L. 642. *Hoolley v. Hurvell* 28 Ch. 375
Boys v. Wood 39 2B. 439.

(a) Charley's Real Property Acts, 55; Brown on Stat. Limitations, 449 Darby & Bosanquet, 354-5.

These cases will apply to Ontario, although, with regard to rent charges, few cases arise in this country.

See 1914 R.D.O. 75 C75.S18 + A.49(1)(K)
 23. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within ten years next after a present right to receive the same *accrued* to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person by whom the same is payable, or his agent, to the person entitled thereto or his agent: and in such case no action or suit or proceeding shall be brought, but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was made or given. 38 Vic. cap. 16, s. 11.

Robt. Macdonald v. Macdonald - 2 R. (1892) 1. 124
 This section is taken from section 8 of 37 & 38 Vic. cap. 57, Imperial Statutes.

Executors v. Bond & Co. 29 Ont. R. 63.
 In the English Act it reads, "but within ten years after a present right to receive the same *shall have* accrued." Also in the English Act it reads, "*shall have been* paid," instead of "has been" paid in 8th line of the present section. Also, "shall be payable" instead of "is payable," as in our Act.

In the English Act, it was substituted for the 40th section of the 3 & 4 Will. IV. cap. 27.

Mr. Charley says, with regard to this section: "It has been held that within the scope of section 40 of the Statute of Limitations of Will. IV. are included foreclosure suits (a); writs of *fi. fa.* (b); writs of *sci. fa.* (c); final decrees of Courts of Equity for the payment of specific sums of money (d);

(a) *Dearman v. Wyche*, 9 Sim. 570; *Sinclair v. Jackson*, 17 Beav. 405 *sed quæ*. See *Wrixon v. Vyse*, 3 Dru. & War. 104; Sugden's New Real Property Statutes, 117.

(b) *Henry v. Smith*, 4 Ir. Eq. Rep. 502; 2 Dru. & War. 381; *O'Hara v. Creagh*, 3 Ir. Eq. Rep. 179; *Long v. Town*, 65; *Watson v. Birch*, 15 Sim. 523.

(c) *Waters v. Lidwell*, 9 Ir. L. R. 362.

(d) *Dunne v. Doyle*, 10 Ir. Chy. Rep. 502.

vendor's lien for unpaid purchase money (*a*), or other liens (*b*); all legacies, whether charged on land or not (*c*), including annuities (*d*); also a residue bequeathed by a will or a share of such residue. (*e*)

This section does not apply to the personal estate of an intestate. We have, however, in our Statute (cap. 61, Revised Statutes, Ontario, sec. 8), introduced the 23 & 24 Vic. cap. 38 (Imperial Statutes), which was passed to remedy the evil.

That section is as follows: "No suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate, or share or some interest in respect thereof, has been accounted for or paid, or some acknowledgment of the right thereto has been given in writing, signed by the person accountable for the same or his agent to the person entitled thereto or his agent; and in such case, no such action or suit shall be brought but within twenty years after such accounting, payment or acknowledgment, or the last of such accountings, payments or acknowledgments, if more than one was made or given." 29 Vic. cap. 28, s. 30.

It was supposed that the Commissioners of the Revised Statutes would have recommended a change in this section to ten years instead of leaving it as at present.

(*a*) *Toft v. Stephenson*, 7 Hare, 1; 1 De G. M. & G. 28.

(*b*) *Du Vigier v. Lee*, 2 Hare, 326.

(*c*) *Shepherd v. Duke*, 9 Sim. 567; *Cooke v. Cresswell*, L. R. 2 Eq. 116.

(*d*) *Roch v. Cullen*, 6 Hare, 531; *Ashwell's Will*, Johns. 112; *Narnock v. Hoiton*, 7 Ves. 391; *Cornfield v. Wyndham*, 2 Cole, 184; *Sibbley v. Parry*, 7 Ves. 522.

(*e*) *Prior v. Horniblow*, 2 Y. & C. Ex. 201; *Christian v. Devereux*, 12 Sim. 264. See also *Dinsdale v. Dudding*, 1 You. & Cole, C. C. 265; *Adams v. Barry*, 2 Cole, 285; *Charley's Real Property Acts*, 48.

The reader will be able to estimate the advantages and disadvantages of such a change after reading the Judgment of Chief Justice Moss, in *Allan v. McTavish*.

Mr. Shelford, in his work on the Real Property Statutes, observes that “no provision appears to have been made for the case of claims to a residue undisposed of by will.” (a)

This Statute limits the right to recover a legacy to ten years.

When does this time commence?

Mr. Banning remarks as follows: “That is to say usually, and except as to after acquired assets, from the expiration of one year from the testator’s death, from which time the legatee is entitled to interest (b). Romilly, Master of the Rolls, in *Earle v. Bellingham*, 24 Beav. 448, *held* that the two periods, namely, that from which the Statute commences to run, and that from which interest is payable, are identical. But see *Spurway v. Glynn*, 9 Ves. 483; and *Shirt v. Westby*, 16 Ves. 393. But inasmuch as the executors’ year is allowed only for convenience and does not prevent vesting, it may possibly be otherwise where there are clearly assets (c). And there may be a further question where there is a direction in a testator’s will for earlier payments. (d)

“Time commences to run against a residuary legatee as soon as he has a present right to receive the residue; that is to say, when he has an opportunity of ascertaining what is the clear residue, and receiving payment thereof (e). From

(a) Shelford on Real Property Statutes, 244, 8th Edit.

(b) Banning’s Limitation of Actions, 209; Williams on Executors, 1286, 6th Edit.; *Turner v. Buck*, W. N. 1874, p. 131; L. J. 18 Eq. 301.

(c) *Gartshore v. Chalie*, 10 Ves. 13. “If a case were produced in which it was quite clear that there was no debts, the Court would give the fund to the party, notwithstanding there had not been a lapse of twelve months.” *Per* Lord Eldon.

(d) Williams on Executors, 1266, 6th Edit.

(e) *Per* Alderson, B., in *Prior v. Horniblow*, 2 Y. & C. Ex. 200, 206. See also *Adams v. Barry*, 9 Cole, 285; *Binns v. Nichols*, L. R. 2 Eq. 259; *Larkins v. Phipps*, W. N. 1873, 207. And see *Knox v. Gye*, L. R. 5 H. L. 674.

Adams v. Barry, it appears that time runs in favour of an executor as to assets from the time they severally come into his possession, and an inquiry in that case was ordered to ascertain what assets had come into the hands of the executor during the twenty years previous to the suit. And this case is explained by Wood, V. C., in the subsequent case of *Binns v. Nichols*, L. R. 2 Eq. 257: ‘What the Vice-Chancellor held (in *Adams v. Barry*) was, that assets which might have been recovered by suit twenty years before filing the bill, could not be recovered; but as to assets that had fallen into possession since, that they were not barred.’

“There is a difference between a *residuary* and *pecuniary* legatee, as regards their right to after acquired assets. Thus, where an annuity had fallen in more than twenty years after testator’s death, a *residuary* legatee was allowed to enforce his right against it, but an unpaid *pecuniary* legatee was not allowed; though the Master of the Rolls said that it would have been otherwise had the latter proved that there had not been sufficient assets till within twenty years to satisfy his legacy; but that this he had not done, and the onus of proof lay with him.” (a)

The decisions with regard to legacies in Ontario may be mentioned.

WITH REGARD TO ABATEMENT.

Payment of a legacy in full is a *prima facie* admission of assets to pay all the legacies in full, otherwise all the legacies must abate in proportion, but it is open to explanation. *Coleman v. Whitehead*, 3 Chy. 227.

The provision for the widow of a testator, and certain legacies, being charged upon real estate, which it was apprehended might prove deficient, the legacies, not the provision for the widow, were ordered to be abated ratably. *Becker v. Hammond*, 12 Chy. 485. *Vide* Judgment of Chancellor Spragge in this case, p. 126, in which the doctrine of election is reviewed.

(a) *Bright v. Larcher*, 27 Beav, 130.

Ademption is the loss of a legacy by the disposition of the property, or by the alteration of the property by the testator during the lifetime of the testator. Wharton defines it as follows: "A taking away of a legacy, *i. e.*, if a testator, after having given a legacy by his will, alienate the subject of it during his life, it is an ademption."

A testator bequeathed to W. L. £1,500, "due to me by R. C., and secured by mortgage." After the making of this will, and in the testator's lifetime, R. C. sold to one H. the property mortgaged, and the testator, to facilitate the sale and receive the debt due him, took from H. a mortgage of this property and other property, and a covenant to pay the amount, retaining in his possession the mortgage from R. C. under which he held the legal estate in the land, and the bond originally obtained from R. C. for payment of the debt. The testator died without in any way altering his will in regard to this legacy. *Held*, that it was not adeemed. 12 Chy. 103. Cases cited: *Blackwell v. Child*, Ambl. 260; *Dingwell v. Askew*, 1 Cox, 427; *Ashburn v. McQueen*, 2 W. & T. 227. *Vide* in Ontario, *Cole v. Cole*, 5 O. S. 747, and judgment of Sherwood, J., on this point.

Under this section, the case of *Allen v. McTavish* must be alluded to. In this case it was contended that plaintiff could not recover on a covenant in a mortgage for more than ten years, and was so held by Morrison, J., 41 Q. B. 567. Taken to the Court of Appeals, this decision was reversed, and the judgment of Chief Justice Moss, reported in Vol. II. Appeal Reports (not yet published), is so clear, that it has been thought good to insert it here:

Moss, C. J. A.—The question for determination is whether "The Real Property Limitation Amendment Act, 1874," has limited to ten years the period within which an action may be brought to recover the money secured by a mortgage of real estate, which contains a covenant for payment by the mortgagor. The point is expressly raised by the pleadings.

The declaration alleged that the defendant, by deed dated 24th November, 1856, covenanted to pay one John Arnold, or his assigns, a certain sum of money with interest, in four equal annual instalments, the first of which became due on the 24th of November, 1857, and that Arnold assigned "the said mortgage" to the plaintiff, yet the defendant did not pay the principal money or interest on any part thereof.

The defendant pleaded that the plaintiff's claim is a sum of money secured by way of mortgage upon certain lands in this Province, and that the suit was brought to recover the same, and the alleged cause of action did not occur within ten years before this suit.

It is from the decision overruling a demurrer to this plea that the appeal has been brought.

The decision seems to affirm that the limitation for bringing an action of covenant upon a bond or other specialty is still twenty years, but it proceeds upon the ground that the defendant is entitled to succeed, because the Statute of 1874 has expressly limited actions to recover money secured by any mortgage of land to ten years, and that this appears from the pleading to be such an action.

The plaintiff contends that the object of the statute was simply to shorten the time for the recovery of money charged upon land by any action or suit which directly affected the land or its proceeds, and relies upon the analogy furnished by the cases, which have permitted more than six years' arrears of interest to be recovered upon the covenant, although they formed no charge upon the land itself for a longer period.

The defendant relies upon what he asserts to be the plain and unambiguous language of the Legislature, which he has embodied in his plea; and contends that the class of cases referred to either have no application, or involved a departure from the terms and spirit of the Statutes under which they were decided, that should not be followed.

Before the enactment under consideration, the right of the mortgagee to recover his principal money was limited by Consol. Stat. U. C. cap. 88, s. 24 (Rev. Stat. cap. 108, s. 23), which prescribed a period of twenty years. The amount of interest recoverable was governed by Consol. Stat. U. C. cap. 88, s. 19, and cap. 78, s. 7 (Rev. Stat. 108, s. 18 & 19, and Rev. Stat. cap. 61, s. 1).

The former section (Con. Stat. cap. 88, s. 19), which is taken without material alteration from the Imperial Statute 3 & 4 Will. IV. cap. 27, s. 42, enacts that no arrears of interest in respect of any sum of money charged upon or payable out of any land shall be recovered by any action or suit, but within six years after becoming due or after a written acknowledgment.

The latter section (Con. Stat. cap. 78, s. 7), which is derived from the Imperial Statute 3 & 4 Will. IV. cap. 42, s. 3, requires actions of covenant or debt upon a bond or other specialty to be commenced within twenty years after the cause of action has arisen. These sections have formed the groundwork of the long series of decisions, the applicability of which has been challenged by the learned counsel for the defendant, who addressed to us a very careful and well considered argument.

It is true, as pointed out by the learned counsel, that at first some difficulty seems to have been felt in harmonizing the two Imperial Statutes, which were passed during the same session; but this difficulty was of short duration, and although it may be that some questions arising upon them are still open, it is quite clear that a complete reconciliation of the two sections has been effected by considering one applicable, where the remedy is sought against the land, and the other where it is sought against the person.

The complication which arose from or was increased by the circumstance that while both the Imperial Statutes were passed during the same session, one received the royal assent before the other, suggesting as it did questions whether one

partially repealed the other, and whether they related to different subject matters or different remedies, has been removed.

The solution of the difficulty has been to treat the charge on the land, and the specialty debt on the covenant as completely distinct, and as if made in separate deeds.

The grounds upon which these decisions proceeded were precisely applicable to the sections in the Consolidated Statutes, for it so happens that here, as in England, the provision allowing twenty years on a specialty came into force after the other. These decisions are so numerous and of such high authority that their binding force is not open to question. Nor can I agree that there is any plausible ground for the contention that they are repugnant to the true intent of the Statutes, and ought not to be accepted as guides in the interpretation of the new Statute. On the contrary, they are in my humble judgment, as one would expect to find, entirely consistent with all sound rules of interpretation.

In the first case that appears to have arisen upon these sections (*Paget v. Foley*, 2 Bing. N. C. 679), Tindal, C. J., thought that there was no conflict between the two enactments, but that if there was, the affirmative enactment permitting the action of covenant to be brought within the longer period must prevail.

The other Judges who took part in the decision seem to have laid stress upon the relative dates at which the Acts received the royal assent, although, as was pointed out, it seemed difficult to suppose, from the short interval between the passing of the two Acts, that any contradiction could have been intended by the Legislature. They all agreed that the action of covenant, which in that case was for arrears of rent due under an indenture of demise, was not limited to six years.

The Court of Queen's Bench, in *Strachan v. Thomas*, 12 A. & E. 558, expressed its concurrence with that decision.

The construction of the two enactments was raised before Sir Edward Sugden, when Lord Chancellor of Ireland. He states in *Hughes v. Kelly*, 3 Dru. & War. 490, that a great deal of the difficulty which has arisen upon the construction of these Statutes in England sprung from the circumstance, that the latter Act was not framed by the persons who framed the former Act. He held that the Statutes being *in pari materia* should be construed together, and if possible reconciled; but the covenant in the case not being with the parties to be paid, he decided that in the proceeding before him only six years' arrears of interest could be allowed.

The subject was fully considered by Lord Cottenham in *Hunter v. Nockolds*, 1 Mac. & Gord. 640, and although that case is very familiar, the *ratio decidendi* has such a direct bearing upon this appeal, that I may be pardoned for tracing its outlines. He points out that the earlier provisions of cap. 27 relate to the limitations of actions and suits relating to real property, and that sec. 40 (with which sec. 24 of Consol. Stat. U. C. cap. 88, exactly corresponds) having made twenty years after the accrual of the right the period within which the proceedings must be instituted to recover any sum of money charged upon or payable out of land, the 42nd section provides that no more than six years' rent or interest in respect of any sum of money charged upon or payable out of any land or rent shall be recovered by any action or suit. He then suggests that the object of the Act being to relieve land from arrears of charges beyond six years, but the enactment creating a bar to all actions and suits for money charged upon or payable out of land, the question probably arose, whether, in protecting the land, the Act had not relieved the debtor from his personal liability, which formed no part of its objects; and that if so, this must soon have been discovered, for by cap. 42, s. 3 (passed only three weeks after the former Act), it is provided that all actions of covenant or debt upon any specialty shall be brought within twenty years.

Perhaps the speculation as to the origin of the later Act is hardly consistent or of equal probability with Sir Edward Sugden's explanation; but it is not on that account the less valuable as a judicial exposition of the objects of the two enactments, and it strongly supports the view which the present appellant proposes of the intent of our Act of 1874. He then proceeds to remark that the provision of the later statute does not profess to deal with the land upon which any demand might be secured, but with the personal action only; and the former Act professed to deal with the land only; and that, so considered, there could be no inconsistency between these provisions, the subject matter of each being different, and no question could have arisen but from the generality of the words "action or suit" in the 42nd section of the earlier Act; but whether the later provision was framed without reference to the earlier, intending to provide for a different subject-matter, namely, personal liability and not the land charged, or whether it was intended to limit the generality of the former provisions by confining them to what was the subject of that Act, namely, the land, was immaterial, for the provisions of the two must, if possible, be reconciled, which can only be done by considering the first Act as applicable only to the land, and the latter as applicable only to the person.

He sums up with the formula that no more than six years' arrears of interest in respect of any sum charged upon or payable out of any land shall be recovered by any action or suit other than and except in actions upon covenant or debt upon specialty, in which cases the limitations shall be twenty years.

I think it will appear, when the provisions of our Act of 1874 are examined, that this case covers the whole ground, and disposes of every argument advanced by the respondent. But the principles thus enunciated do not rest upon the sole authority, eminent as it confessedly is, of Lord Cottenham. In *Manning v. Phelps*, 10 Exch. 59, the Court of Exchequer

held that the limitation of six years did not extend to an action on a covenant for payment of a rent charged upon land by the same deed, although the right to recover the rent charge out of the land had been barred by the Statute. No weight was attached to an argument, precisely similar to that addressed to us yesterday, namely, that the covenant was not an independent contract to pay money, but a covenant to pay that particular annuity charged on the land, and that as the annuity had ceased to exist, the covenant was inoperative.

In *Sinclair v. Jackson*, 17 Beav. 405, the Master of the Rolls expressed the opinion that, although interest upon a mortgage of a reversionary estate can only be recovered for six years as against the land, it is otherwise upon the covenant for payment. In that case there were sixteen years' arrears of interest upon money secured by a mortgage upon land with a covenant to pay, when the mortgagee brought a suit of foreclosure against the mortgagor's heir. In his bill he raised no question of liability on the covenant, or of his right to tack as against the heir. Upon an appeal from the report of the Master, who had held the plaintiff entitled to six years' arrears only, the finding was sustained on the ground that the Court could not decide the question, as it had not been raised upon the pleadings, and that the form of the decree, which simply directed the Master to take an account of what was due on the mortgage securities, precluded the assertion of the right.

But the learned Judge remarked at page 413: "I do not think it makes any difference whether the debt which the plaintiff claims is secured by a covenant in the same or some other deed; in either case it is a distinct security." This opinion, which is amply supported by other cases, effectually disposes of any notion that the present appellant is in any worse position than if he had a separate money bond for the amount of the mortgage debt.

The soundness of this interpretation is also expressly or tacitly recognized in the decisions which hold that where

there is a trust created for the payment of the mortgage, the full arrears may be recovered.

For example, although the case of *Cox v. Dolman*, 2 De G. M. & G. 592, was heard by special leave before the Lord Chancellor and the Lord Justices in the first instance, because he felt himself embarrassed by what he conceived to be a conflict between the decision of Lord Lyndhurst in *Young v. Waterpark*, and that in *Hunter v. Nockolds*, it is plain that the principles laid down in the latter case, with which we are here concerned, are unaffected by the judgment.

In *Lewis v. Duncombe*, 29 Beav. 188, the Master of the Rolls explained the decision in *Cox v. Dolman*. He said that the Lord Chancellor and Lords Justices were of opinion that the case before Lord Lyndhurst, and *Hunter v. Nockolds*, ought not to be regarded as contradictory.

In *Round v. Bell*, 30 Beav. 121, the learned Judge adhered to the views he had expressed in the case last mentioned.

In *Shaw v. Johnson*, 1 Drew. & Sm. 412, the same view of the enactments is implied.

Further illustrations of the ample acceptance which Lord Cottenham's construction has received, are furnished by the cases in which a mortgagee has been allowed, as against the heir of the mortgagor, to tack additional arrears of interest in order to avoid circuitry of action. It is sufficient to refer to *Elvey v. Norwood*, 5 De G. & Sm. 243, where the Vice-Chancellor said: "Upon the construction of the Statute 3 & 4 Will. IV. cap. 27, it had been decided, and, I think, rightly decided—at all events in a way that is binding on this Court—that the only arrears of interest that are a charge upon the land are arrears for six years. On the other hand, there is the other Statute, the 3 & 4 Will. IV. cap. 42, which leaves the personal liability on the covenant open for twenty years." The cases in our own Court of Chancery have adopted the same rule. In *Carroll v. Robertson*, 15 Gr. 173, Mowat, V. C., concisely put it that, "During the

life of a mortgagor the mortgagee can only claim a lien on the land for six years of overdue interest, but the mortgagor is liable on his covenant for twenty years' arrears; and after his death, the mortgagee, to avoid circuitry, is permitted as against the heirs, to tack to his debt the whole amount of interest recoverable on the covenant."

In *Airey v. Mitchell*, 21 Gr. 512, Blake, V. C., stated the result of the authorities to be that "No more than six years' arrears of interest in respect of a sum of money charged upon, or payable out of land, can be recovered by suit, except in an action upon the covenant, in which case the limitation shall be twenty years."

The same doctrine was enunciated in *Howeren v. Bradburn*, 22 Gr. 98.

It was after this long and consistent array of authorities, of which they must be assumed to have been cognizant, that the Legislature proceeded to pass the Act in question. It opens with a recital, which, to my mind, clearly indicates an intention to amend cap. 88, but to leave cap. 78 unaffected. It declares, *inter alia*, the expediency of lessening the time for making entries and distresses, and for bringing actions and suits to recover land or rent, and for redemption by mortgagors, and for recovery of dower, and of money charged on lands or on rent; but it does not contain the remotest suggestion of interference with the time for resorting to the personal remedy. The object to be gathered from the recital, is that of relieving the land from charges, and not that of releasing the debtor from personal liability. It is only necessary to advert to the reasoning in *Hunter v. Nockolds*, to appreciate the force of this distinction. The enacting part proceeds to lay down provisions for a number of cases, which were previously regulated by cap. 88; and in the eleventh section (Rev. Stats., cap. 108, s. 23), enacts that no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or other-

wise charged upon, or payable out of any land or rents at law or in equity or any legacy, but within *ten* years next after a present right to receive the same shall have accrued to some person "capable of giving a discharge," &c. This is the clause upon which the judgment in appeal proceeded.

Its language is precisely identical with that employed in cap. 88 Consol. Stat. U. C., except that the period is reduced to ten years. We have seen that the provisions of cap. 88 did not prevent a mortgagee from recovering under cap. 78, but that his rights against the land, regulated by one enactment, and his rights against the person regulated by the other, are entirely separate and distinct. It manifestly follows that the alteration of cap. 88, by simply substituting a shorter period for a longer, leaves the other Statute untouched.

The argument which was most strenuously urged was that money sought to be recovered was in fact charged upon land, and that the right to recover it being confessedly lost, there could not consistently with the Statute be any remedy. That general view seems to have strongly impressed Sir E. Sugden, before he was brought face to face with the construction of the two Statutes, for in *Henry v. Smith*, 2 Dru. & War. 381, he said: "It was said that if judgment creditors are held to be included in this section, they still will be able to proceed against the personal estate of their debtor for the full arrears of interest. I admit no such consequence. The two clauses relate to money secured upon land, and to the interest of money so secured: and when the Act of Parliament says no action shall be maintained after a given number of years for the recovery of such sum or such interest, how can a man after that period bring any action in respect of his debt? If the action is brought so as to charge the personal estate, the answer is obvious: 'You have brought your action in respect of a sum of money charged upon or payable out of real estate; you are therefore within the terms of the Act, and consequently your right is barred.'

The personal estate may be an additional security to such a creditor, but however numerous his securities, they could not carry his right farther; if his remedy under the real security is gone, it is also barred of all the other securities."

But he was then considering only cap. 27, sec. 42, taken in connection with an enactment that every judgment debt should bear interest, and the Statute which extended cap. 42, sec. 3, to Ireland was not in question.

We have already seen from the notice of *Hughes v. Kelly*, how the conjunction of the Statutes modified his view, and seemed to lead him to the same conclusion as Lord Cottenham.

The appeal must be allowed, with costs, and judgment on the demurrer entered for the plaintiff in the Court below.

BURTON, J. A.—Mr. Ferguson admitted very frankly upon the argument that, unless this case was distinguishable from *Hunter v. Nockolds*, 1 Mac. & Gord. 640, the judgment below must be reversed; but he attempted to distinguish it, relying upon the terms of the recital in the recent Act as making entirely new provisions as to money charged upon land, coupled with the positive language of sec. 11, which declares that no action, suit, or other proceeding shall be brought, either at law or in equity, to recover any sum of money secured by mortgage or otherwise charged upon or payable out of any land, but within ten years next after a present right to receive the same shall have accrued; and he contended that this must be held to apply to such actions as the present, and impliedly to have repealed the 7th sec. of the Consol. Stat. of U C., cap. 78, in all cases where the covenant was entered into to secure money charged upon land, and to have made a new provision, binding the right to recover upon the covenant to the shorter period mentioned in the recent Act.

The effect, however, of the case to which I have referred, and of numerous other cases, both here and in England,

since the passing of the Acts which were consolidated in our Statutes as caps. 78 & 88 respectively, was to hold that the latter had reference only to the land on which a demand was secured, the object being to relieve land from the claims of mortgagees and persons holding charges upon it within a reasonable term, which object was not affected by the term of the other Act, which relates to a different subject, namely, to personal actions only, the construction of the two Acts taken together, as regards rent or interest, being that no more than six years' arrears of rent or interest, in respect of any sum charged upon or payable out of land or rent, should be recovered by any distress action or suit other than, except in actions in covenant or debt upon specialty, in which case the limitation was governed by the other statute and fixed at twenty years.

That being the construction placed upon the English Statutes, our own, which were substantially the same, were consolidated as above mentioned, thereby adopting the construction placed upon them.

The recent Act purports to be, and is in fact, an amendment to cap. 88, and is to be read with it. It only professes to deal with land and charges upon it, and limits the term, both for the recovery of the land itself and the charges upon it, and does not profess to deal with statute, cap. 78, which, by a long course of judicial decisions, had been held to deal with an entirely distinct matter, namely, the collateral covenant or security for the payment of the money.

The language used in section 11 is identical with that of section 24 of the former Act, except as to the former period of limitation; and having been adopted with the knowledge of the interpretation placed upon the former Act, must be construed in the same manner.

It could scarcely have been intended to deprive a person of the personal security of a covenant which, by a long course of decision, had been held not to come within

the term limited by the other Act, namely, twenty years. It would require express language to deprive him of that right.

The appeal should be allowed, and judgment entered for the plaintiff upon the demurrer.

As to reviving a judgment, in *Caspar v. Keachie*, 41 Q. B. 599. "A writ of revivor, or suggestion entered upon the role, is a proceeding, and a judgment is to be considered as charged upon or payable out of land, within 38 Vic. cap. 16, s. 11 (the present section under review), so that it cannot be revived by writ or suggestion after ten years."

On the argument, the following cases were cited in support of the present decision: *Watson v. Birch*, 15 Sim. 523; *O'Kelly v. Bodkin*, 2 Ir. Eq. Rep. 373; *Henry v. Smith*, 2 Dru. & War. 381; *Benington v. Evans*, 1 Y. & C. Exch. 434.

Proceedings to revive a judgment are within this section. *Waters v. Lidwell*, 9 Ir. L. R. 362. A writ of *sci. fa.* will issue to revive a judgment given as collateral security for the payment of an annuity, although more than twenty years have elapsed since it was signed, if payment of the annuity within that time has been made. *Williams v. Welch*, 3 Dowl. & L. 565.

There seems to be a clear distinction between the case of a covenant in a mortgage and a judgment. In the former case the covenant is a specialty, and has nothing at all to do with the land. In olden times it was the custom to have two separate instruments, a bond and mortgage; and although the covenants in the present form of a mortgage do away with the necessity of a bond, yet the force of these covenants is the same as before, under the Act of Rev. Stats. Ont. cap. 61, s. 1.

The Legislature might as well have shortened the time to ten years with regard to covenants. Why covenants, personal covenants, should have twenty years to run, and a

Right of
renewal
after 20
years
Pouches
no williams
town 670

See 1914 R.S.O.
C.75 § 18
249(1)(K)

mortgage only ten, is difficult to imagine. "It is one of those things that no one can understand, you see."

Shelford, in his Real Property Statutes, p. 237, says: "This section (sec. 40 of 3 & 4 Will. IV. cap. 27) applies to a case in which a judgment is sought to be enforced against the personal estate, as well as to a case in which it is sought to be enforced against the land of the debtor. The intention of the Legislature was that no proceeding whatever should be taken on a judgment after the lapse of twenty years from the time when the money secured by it became due, unless there was some payment on account or acknowledgment in writing within that period." (a)

A decree of a Court of Equity, for the payment of a specific sum of money, is included under judgment in that section. *Dunne v. Doyle*, 10 Ir. Chy. Rep. 502.

As to the effect of the Administration of Justice Act, *vide Sawyer v. Linton*, 23 Gr. 43; *Knox v. Travis*, 23 Gr. 41; *St. Michael's College v. Merrick*; Appeal Court, Vol. I., p. 520.

The principles which now actuate Courts with regard to the filing of "disputing note," and the effect thereof, as indicated on p. 89, have been fully enunciated in a late case of *Wright v. Morgan* (Appeal Reports, Vol. I. 613), where it was *held* (reversing the decision of V. C. Proudfoot, 24 Grant, 457) that it is unnecessary to plead the Statute of Limitations in mortgage suits to prevent the recovery of more than six years' arrears of interest in taking the accounts before the Master, as the filing a disputing note is sufficient.

24. No action, suit or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages

(a) *Watson v. Birch*, 15 Sim. 523; see contra, *Henry v. Smith*, 2 Dru. and War. 391.

in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust. 38 Vic. cap. 16, s. 13.

This section is taken from the Imperial Statute, 37 & 38 Vic. cap. 57, s. 10.

Lord Selborne says, in his speech when introducing the Land Titles and Transfer Bill of 1873 :

“ Upon the construction of 3 & 4 Will. IV. cap. 27, it has been judicially held that the period of six years, limited by the Act for the recovery of arrears of interest on a mortgage or charge, does not apply if the term of years in the land has been vested and is still subsisting in a trustee for the creditor as part of his security, although such trustee may not have been in possession or in receipt of any interest whatever, for a longer period than six years.

“ It is proposed now to declare that the limitation of ten years as to principal, and six years as to interest, shall henceforth apply to all such cases.”

Mr. Charley says on this section : “ The 10th section of the new Act destroys the strained construction put upon the 25th section of the Statute of Limitations of Will. IV.” [section 25 is engrafted in the present Ontario Statute, and is section 30 of the present Act], “ in a long series of cases commencing shortly after the passing of that Statute, and culminating in *Burrowes v. Gore* (a), decided by the highest Court of Appeal, in 1858.”

It restores the authority of *Knox v. Kelly*, decided by Sir Francis Blackburn (b), when Master of the Rolls in Ireland, in 1844 : “ Am I then, in deference to authority, to hold that a trust of real estate to pay a sum of money is one giving a right against which the Statute is never to operate ? It is impossible for me to decide against the plain and unambiguous words of the 40th section, and I must therefore

(a) 6 House of Lords Cases, 907.

(b) 6 Ir. Eq. Rep. 279.

decide that this legacy is barred by that express enactment of the 40th section of the Act.”

“ Yet, notwithstanding this decision, and the express words of the 25th section, confining its operation to ‘*any land or rent*,’ the current of authorities set in so strongly in favour of the opposite view, that Lord St. Leonards, when delivering his judgment in the case of *Burrowes v. Gore* (a), in the House of Lords, said, ‘I think it is perfectly settled that a charge of this nature, to be raised by express trust, falls within the saving [of the 25th section] as much as if the express trust had been applied, not to charges upon the land, but to the land itself.’ ‘The Statute of Limitations,’ he said, ‘is very singularly framed with regard to matters of this nature (?), for in the earlier sections it only provides for trusts which affect the land or rent. But when you come to section 40 and so on, as to charges upon land, you have then no corresponding section with regard to trusts as to such charges. There is always a difficulty in applying the statute when you come to trusts, not with regard to the land itself, but with regard to charges upon land; but, however, I consider it perfectly settled, and rightly settled, that the construction is the same in either case.’ (b)

“ In the learned work of Messrs. Darby & Bosanquet on ‘The Law of Limitation as to Real Property,’ Chap. xix., the following summary is given of the law upon this subject :

“ ‘The 25th section follows the wording of the 24th, on which *it seems to be engrafted as an exception applying only to claims to the same subject-matter as there referred to, viz., land or rent*. No similar exceptions is made in direct terms for express trusts in these cases where the *cestuis que*

(a) 6 House of Lords Cases, 907, 961.

(b) In the cases of *Burrowes v. Gore* the trust was created fifty years before the suit was brought, but the right of the plaintiffs, the *cestuis que trustent*, did not arise till two years before the suit, owing to the interposition of a protracted life interest in their father, so that the question as to whether the right to the charge was barred by the 40th section did not, except incidentally, arise. It is difficult to see on what ground Lord Wensleydale held that the statute began at law to run in 1816.

trustent claim, not estates in land or rent, but charges on them which come within the provisions of the 40th and 42nd sections (a) . . . and great difficulties were felt in deciding whether the 25th section applied in any way to save the rights of the *cestui que trust* in those cases (b). It was at one time decided in Ireland that it had no such operation, and that a legacy charged on real estate with a trust created for its payment, was not saved by the 25th section from the operation of the 40th section (c). But the opposite view has been upheld in numerous cases, and is sanctioned by the House of Lords (d); and it must be considered as now finally decided that, notwithstanding the lapse of the periods specified in the 40th and 42nd sections, an express trust, created by deed or will for the payment of debts, portions or legacies out of land or rent, may be enforced against a trustee under the exception in section 25, or one engrafted on that section by analogy. And, therefore, that when an estate is vested in trustees in trust to pay annuitants or raise a gross sum of money, lapse of time will not bar any part of the claim of the *cestui que trust*, so long as the trustees retain possession of the land or *the right to recover* the same.' (e)

(a) Messrs. Darby & Bosanquet here add, "and great hardships would be imposed on such a *cestui que trust* if he were barred of all remedy against a trustee holding on an express trust in his favour in the periods specified in these sections." But "hard cases make bad law."

(b) See *Law v. Bagwell*, 4 Dru. & War. 398, 408; *St. John v. Boughton*, 9 Sim. 219; *Young v. Wilton*, 10 Ir. Eq. Rep. 10.

(c) *Knox v. Kelly*, 6 Ir. Eq. Rep. 297 (*supra*); *Burne v. Robinson*, 1 Dru. & Walsh, 688.

(d) *Burrowes v. Gore*, 6 H. of L. Ca. 907, 961 (*supra*).

(e) *Hunt v. Bateman*, 10 Ir. Eq. Rep. 360; *Dillon v. Cruise*, 3 Ir. Eq. Rep. 70; *Young v. Waterpark*, 13 Sim. 204; 15 L. J. (Ch.) 63; *Dundas v. Blake*, 11 Ir. Eq. Rep. 138; *Blair v. Nugent*, 3 Jo. & Lat. 658, 668; *Ward v. Arch*, 12 Sim. 472; *Gough v. Bult*, 16 Sim. 323; *Watson v. Saul*, 1 Giff. 188; *Cox v. Dolman*, 2 De G. M. & G. 592; *Shaw v. Johnson*, 1 Drew. & Sim. 412; *Snow v. Booth*, 8 De G. M. & G. 69; *Mansfield v. Ogle*, 2 L. J. (Ch.) 700; *Lewis v. Duncombe*, 29 Beav. 175; *Re Wyse*, 4 Ir. Ch. Rep. 297; *Blower v. Blower*, 5 Jur., N. S. 33; *Lawton v. Ford*, L. R., 2 Eq. 97; *Burrowes v. Gore*, *ubi supra*.

“Mr. Brown, in his able work on the same subject, lays down the doctrine deducible from the cases equally broadly :

‘As against the trustee and any person claiming through him without value, and whilst the relation between [the trustee or such person and the *cestui que trust*] continues, the right of the *cestui que trust*, in general, remains unaffected by time (a). The statute was not designed to interfere with the well-established principle of equity, that, as between an express trustee and *cestui que trust*, length of time creates no bar.’” (b)

Mr. Banning, in his work on limitations, p. 189, says: “A difficult question arose on the construction of 3 & 4 Will. IV. cap. 27, as to whether section 25 (c), by which the saving as to express trusts is created, extends to the subjects dealt with in sections 40 & 42 (d) of the Act, namely, on money charges on land or rent. It was at one time held otherwise in Ireland (e), but this view was not upheld by the House of Lords (f); and it is now established that when land or rent is vested in trustees upon express trust to raise legacies, annuities, or other charges, time will not run as between trustee and *cestui que trust* as to any part of the principal or interest of such charges.” (g)

(a) *Attorney-General v. Flint*, 4 Hare, 147; *Daly v. Kirwan*, 1 Ir. Eq. Rep. 163; *Dillon v. Cruise*, 3 Ib. 83; *Hunt v. Bateman*, 10 Ib. 360; *Francis v. Grover*, 5 Hare, 39; *Phillips v. Mannings*, 2 Myl. & C. 309; *Petre v. Petre*, 1 Drew. 317; *Evans v. Bagwell*, 2 Con. & L. 617; *Tyson v. Jackson*, 30 Beav. 384; *Young v. Lord Waterpark*, 13 Sim. 204; 6 Jur. 656; 10 Ib. 1; *Burrowes v. Gore*, *ubi supra*; *The Commissioners of Charitable Donations v. Wybrants*, 2 Jo. & Lat. 182.

(b) *Hunt v. Bateman*, 10 Ir. Eq. Rep. 360. See Brown on the Law of Limitations as to Real Property, Bk. IV. chap. iv. s. 3, p. 497; Sugden's Vendors and Purchasers, p. 478, 14th Edit.; Dart's Vendors and Purchasers, pp. 352, 353, 4th Edit.

(c) Ontario Statute, s. 30.

(d) Ontario Statute, ss. 16, 17, 31.

(e) *Knox v. Kelly*, 6 Ir. Equity Reports, 279; *Burne v. Robinson*, 1 Dru. & Walsh, 688.

(f) *Burrowes v. Gore*, 6 H. L. 907.

(g) *Ward v. Arch*, 12 Sim. 472; *Young v. Lord Waterpark*, 13 Sim. 204, 10 Jur. 1 & 15, L. J. Ch. 63; *Cox v. Dolman*, 2 De G. M. & G. 592; *Mutlow v. Bigg*, L. R. 18.

The present section appears to have nullified the old decisions with regard to express trusts, so far as limiting the time to ten years and six years for bringing an action to recover a legacy or arrears of interest, as the case may be, "secured by an express trust."

"An express trust must be actually expressed by deed, will, or other writing, and in such way as to vest the legal estate in the trustees. 'To create an express trust,' says Lord Westbury (*a*), 'two things must combine; there must be a trustee with an express trust, and an estate or interest vested in the trustee.'" (*b*)

DOWER.

25. No action of or suit for dower shall be brought but within ten years from the death of the husband of the doweress, notwithstanding any disability of the doweress or of any person claiming under her. 38 Vic. cap. 16, s. 14.

Proceedings to recover dower are regulated by Revised Statutes, cap. 55.

The case of *Becker v. Hammond*, 12 Chy. 485, which was a case in which the main question that arose was whether the widow was entitled to dower in addition to the provision made for her by the husband's will, deserves notice.

Part of the judgment of the present Chancellor Spragge, embodying, as it does, most of the law on that point up to the time of the judgment, I have here inserted:

"One can scarcely read the will without the conviction almost that the testator intended the particular provision that he made for her to be her sole provision. But the cases in favour of the widow having dower in addition to the particular provision made by the will are very strong. I may refer, among many others, to *Foster v. Cooke* (*a*), before Lord Thurlow; to *French v. Davis* (*b*), in which

(*a*) *Dickenson v. Teasdale*, 1 De G. J. & Sim. 52.

(*b*) *Banning's Limitation of Actions*, p. 189.

(*c*) 2 B. C. C. 347.

(*d*) 2 Ves. Jun. 572.

Lord Alvanley reviewed the previous cases; to *Gibson v. Gibson* (a), and *Bending v. Bending* (b). These cases and others are strong in favour of the dower. On the other hand is the late case of *Parker v. Sowerby* (c), and the case of *Hall v. Hall* (d), before Lord St. Leonards when Lord Chancellor of Ireland. It has often been observed that these cases are irreconcilable. Those in favour of the dower go mainly upon this, that the testator must be understood as disposing of his estate subject to his wife's dower, the wife's dower not being his own. With great deference to the opinions of the learned judges who have insisted upon this point, I cannot but think that in some cases they have pushed the doctrine rather far. *They all, however, agree that it is a question of intention.* It is not, perhaps, settled law that the circumstances of the estate of the husband being insufficient to satisfy the wife's dower, and also an annuity given to her by the will, will put her to her election. Mr. Jarmin calls it a fluctuating and unsatisfactory rule (e); but *Pearson v. Pearson* (f) is in its favour; and Lord Alvanley, in *French v. Davis*, referring to *Pearson v. Pearson*, spoke approvingly of the course that had been taken in that cause. Mr. Roper, in his *Treatise on the Law of Husband and Wife*, p. 49, states as the result of the authorities, that when the estate of the testator is insufficient to pay an annuity to the wife and to answer her dower, the intention will be apparent that the husband did not mean that she should be at liberty to enforce both her claims; and the same opinion is reiterated in the treatise on legacies (g). I ought to add that the learned judge who directed the inquiry in this case must, I apprehend, have been of the same opinion, otherwise the inquiry would be useless. It was, I believe, my late learned brother, Vice-Chancellor Esten."

(a) 1 Dy. 42.

(d) 1 D. & W. 102.

(b) 3 K. & J. 257.

(e) Jarmin on Wills, 430.

(c) 4 D. M. & G. 321.

(f) B. C. C. 292.

(g) Roper on Legacies, 1427.

Vide also *Westacook v. Cockerline*, 13 Chy. 79; *McLennan v. Grant*, 15 Chy. 65. These cases all go to shew that the particular circumstances of the case have warranted the Court in holding that the widow is bound to elect; yet, where a testator by his will made provision for his widow, but did not express the same to be in lieu of dower, evidence for the purpose of shewing that he intended it in lieu of dower was held inadmissible. *Fairweather v. Archibald*, 15 Chy. 255. See also *Davidson v. Boomer*, 15 Chy. p. 1. —Spragge, V.C.

In *Fairweather v. Archibald*, V. C. Spragge says: "It has long been settled law that a demise by a testator to his widow of part of the lands of which she is dowable is not inconsistent with her claim to dower in the residue; also, that a demise upon trust to sell of lands of which a widow is dowable is not inconsistent with her claim to dower in the same lands. The rule is, that if a testator has so devised any part of his real estate that the widow's claim of dower is *inconsistent* with carrying into effect the testator's whole intention, as expressed in his will, she is put to her election. The point in question has been decided by Sir Richard Kindersley, in *Gibson v. Gibson*, 1 Drew. 42 & 57."

Vide *Stewart v. Hunter*, 2 Chy. Chambers, 336—Mowat; *Hutcheson v. Sargent*, 16 Chy. 78; *Lapp v. Lapp*, 16 Chy. 159. *Held*, entitled to an inquiry to ascertain whether the estate was sufficient to assume certain gifts in addition to the dower. *Vide* also 19 Chy. 608; *Coleman v. Glanville*, 18 Chy. 42; *Lee v. McKinley*, 18 Chy. 527.

A testator devised land to his children in tail with cross-remainders, and, in the event of their dying without issue, to his brother; and directed his widow to receive the whole of the rents, &c., during widowhood; and in the event of her marrying, she was to receive one half thereof for life. *Held*, that the contingency of the widow surviving all the children was too remote to put her to elect. *Travers v. Gustin*, 20 Chy. 106; *Armstrong v. Armstrong*, 21 Chy. 351; *McGregor v. McGregor*, 20 Chy. 450.

Where the property (real and personal) was to be divided equally between the wife and two children, a son and a daughter, it was *held* that the wife must elect, as otherwise there could be no equal distribution of the property if the wife first took out her dower; following *Chalmers v. Storrie* (a), and *Dickson v. Robinson* (b). *Patrick v. Shaver*, 21 Chy. 123, follows the same course.

A wife cannot be endowed of lands given and taken in exchange, but she has her election to take one or the other. *McLennan et ux. v. Meggatt*, 7 Q. B. 554; *White v. Laing*, 2 C. P. 186.

Such an action must be pleaded by a party defending in an action for dower. *Ibid.*

As to form of such a plea. *Leech v. Dennis*, 24 Q. B. 129.

To entitle a woman to damages in dower, it must be alleged and proved that the husband died seised of an estate of inheritance. *Jones v. Jones*, 2 C. & J. 601; s. c. 2 Tyrw. 531.

Courts of Equity shew great indulgence to a doweress (6 Ves. 89), and will assist a woman by putting out of her way a term which prevents her obtaining possession at law, but that is only as against an heir or volunteer. *Lord Dudley and Ward v. Lady Dudley*, Preced. Chan. 241; *Lady Radner v. Rotherham*, Preced. Chan. 65.

Under the Administration of Justice Act, dower might be brought in any Court.

(a) 2 V. & B. 222.

(b) Jac. 503.

PART III.

REVISED STATUTES OF ONTARIO.

CAP. 108.

BAR OF ESTATES TAIL BY WANT OF ENTRY.

26. Where the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, has been barred by reason of the same not having been made or brought within the period limited by this Act, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred. C. S. U. C. cap. 88, s. 28.

This section is taken from C. S. U. C. cap. 88, s. 28, which was taken from the 3 & 4 Will. IV. cap. 27 (Imp. Stat.) s. 21.

“It applies to cases where the prescribed period has run out against a tenant in tail during his life; and provides, in effect, that in such a case the right of all persons, whom he might have barred by any act of his own, shall be barred by the effluxion of time against himself.” (a)

“The Statute of Will. IV. gives time practically the same effect in barring the issue in tail, and the remainders over as an assurance to bar under the Fines and Recoveries Act.” (b)

The Ontario Statute (Revised Statutes, cap. 100), with regard to estates tail, has generally had the effect of turning all estates tail into estates in fee, as the actual tenants in tail availed themselves of the provisions of that Statute. It was taken from C. S. U. C. cap. 83.

(a) Charley's Real Property Acts, p. 44.

(b) Darby and Bosanquet's Statute of Limitations, p. 310.

Before the passing of the Act respecting the assurance of estates tail, a tenant in tail executed a deed purporting to convey the property in fee, and gave up possession to the purchaser. *Held*, that the Statute did not begin to run till the death of the grantor. *Re Shaver*, 2 Chy. Chambers, 379.—Mowat.

As to this section, *vide* Darby and Bosanquet's Statute of Limitations, p. 311; also *Austin v. Llewellyn*, 9 Ex. 276. In *Goodall v. Skerratt*, 3 Dru. 216, an estate tail was limited to A., remainder in tail to B., remainder to C. A. dies; then B. dies within twenty years, and C. becomes entitled in possession, being then under disability. It was *held*, that under the 21st and 22nd sections of that Act (3 & 4 Will. IV. cap. 27), time commenced running against C. from the death of A., and that having commenced to run, C. was not saved from its operation under section 16, by being under disability when her right accrued in possession. Vice-Chancellor Kindersley said, the intention and operation of the 21st and 22nd sections are to put remainder-men, whose estate might be barred by the tenant in tail, in the same position as if they claimed under tenants in tail; that is, the act of the tenant in tail, in allowing any portion of the twenty years to run without making an entry or bringing an action to the extent of the period allowed to elapse, binds the remainder-man.

It has been said by Bramwell, B., that sections 21 & 22 (27 & 28 Rev. Stat.) refer only to estates in remainder and reversion, the estate of the tenant in tail, which descends to his issue, being provided for by sec. 2. *Earl of Abergavenny v. Brace*, L. R. 7 Ex. 149-173.

Joint tenants in tail executed articles of agreement for the division of the property, and each went into possession, and for thirty-six years continued to enjoy the portion allotted to him, when a bill was filed to enforce the agreement. *Held*, that the defendant could not set up as a defence to such bill, that the plaintiff had by possession acquired a

perfect title at law. A decree for specific performance will be made against a tenant in tail. *Graham v. Graham*, 6 Chy. 372.

27. Where a tenant in tail of any land or rent entitled to recover the same has died before the expiration of the period limited by this Act, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred, shall make an entry or distress or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action. C. S. U. C. cap. 88, s. 29.

This section is taken from the 22nd section of the Imp. Act 3 & 4 Will. IV. cap. 27.

“It applies to cases where the prescribed period has begun to run against a tenant in tail in his lifetime. But he has died before the completion of the prescribed period; and in such case, the right of all persons whom he might have barred shall be barred by the effluxion of the time, which would have sufficed to bar himself if he had continued to live.” (a)

The twenty years for making an entry did not commence under the Stat. 21 Jac. I., cap. 16, until the right accrued. An estate might have been enjoyed for centuries, under an adverse possession, against a tenant in tail, and afterwards have been recovered by a remainder-man, as, for example, where an estate was limited to one in tail, with remainder to another in fee, and the tenant in tail and his issue were barred by the Statute of Limitations; yet as the remainder-man's right of entry did not accrue till the failure of the issue of the tenant in tail, which might not have happened for an immense number of years, the remainder-man might at any time within twenty years after the failure of the issue in tail have entered and recovered the estate in ejectment. *Taylor v. Horde*, 1 Burr. 60.

(a) Charley's Real Property Acts, p. 44.

The section with regard to a married woman conveying land separate from her husband, formerly part of "An Act respecting the Assurance of Estates Tail," is now sec. 4 cap. 127, Rev. Stat.

The decision *Re McElvoy*, 32 Q. B. 95, it is submitted, is not now applicable.

Quære: Whether a mortgage in the short form under 27 & 28 Vic. cap. 31, executed by the tenant in tail, has the effect of barring the entail. *Re Dolson*, 4 Chy. Chambers, 36.—Taylor, Referee.

See as to estate tail *Dumble v. Johnson et al.*, 17 C. P. 9.

28. Where a tenant in tail of any land or rent has made an assurance thereof, which does not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person is *by virtue of such assurance*, at the time of the execution thereof, or at any time afterwards, in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which has taken effect after or in defeasance of the estate tail) continues or is in such possession or receipt for the period of ten years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of ten years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail. 38 Vic. cap. 16, s. 7.

This section is taken from the 23rd section of 3 & 4 Will. IV. cap. 27.

The effect of the present enactment, 38 Vic. cap. 16, s. 7, is to shorten the time from twenty years to ten years. Mr. Banning, in his able work, thus speaks of the effect of the 21st and 22nd sections of 3 & 4 Will. IV. (secs. 26 & 27 of this Act): "The joint effect of the two sections, there-

fore, is to bar the rights of any person whose remainder the tenant in tail could have barred himself by a proper assurance, and without the consent of a protector or other party at the end of twenty (ten in Ontario Statute) years from the period when time commenced to run against such tenant in tail, whether such twenty years expires in his lifetime or not. This is only true, however, where the tenant in tail is barred by laches or voluntary abandonment, and not where he has, by a defective assurance, conveyed away the property, in which case he cannot enter against his own grant, and time will not begin to run till his death. (a)

“It seems, indeed, that issue in tail are barred by secs. 1 & 2 of the Act, and that the sections now in discussion apply principally to the subsequent remainder-men (b), and previously under the Statute of James, though the issue in tail might be barred for any length of time; yet on the ultimate failure of such issue the right of the remainder-man arose, and he was allowed a fresh period of twenty years to pursue his remedy.

“We have now seen how the issue in tail and remainder-men may be deprived of their rights through the laches of their predecessors; but there yet remain those cases where the tenant in tail has voluntarily conveyed away his interest by an assurance defective in some way, either, for instance, ineffective against the issue in tail by reason of non-enrolment, or against the remainder-men, though enrolled through the absence of the consent of the protector. The latter case is expressly provided for by the 23rd section of the Act we are now considering.” (c)

That would be the 28th section of Revised Statutes, cap. 108.

(a) *Earl of Abergavenny v. Brace*, L. R. 7 Ex. 145-53.

• (b) *Earl of Abergavenny v. Brace*, L. R. 7 Ex. 145; *Cannon v. Rimington*, 12 C. B. 1; 21 L. J. C. P. 137; s. c. in Ex. Cham. 12 C. B. 18; and 22 L. J. C. P. 153.

(c) *Banning's Limitation of Actions*, 112-114.

This section may be explained by the following example: A testator leaves land in tail to his son A. A. has a son B. Remainder to E. A. executes an assurance to bar the estate tail to C. (a deed, for instance, under the Rev. Stats. cap. 100, s. 3), which turns out to be a defective conveyance. C. enters into possession of the land under the assurance; then at the end of ten years from the date of the assurance, if there be no protector, or ten years after the prior estate has passed away if there be a protector, not only the tenant in tail is barred, but also the remainder-man.

“The sole effect of this section seems to be to enlarge a base fee into a fee simple. In a case where the tenant in tail has by a deed duly enrolled so as to bind the heirs in tail, but without the consent of the protector, and therefore not so as to bind the remainder-men, conveyed away his property, and thus created a base fee in the assignee, this base fee may be enlarged into a fee simple, by expiration of the usual period of twenty (ten) years. This period, however, dates only, and time commences to run only from the time when the assurance, otherwise valid, but defective from want of the concurrence of the protector, would, if then executed, not need such concurrence, owing, for example, to the assurer having in the meantime become tenant in tail in possession.” (a)

“‘Base fee’ shall mean that estate in fee simple, in which an estate tail is converted, where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred.” (b)

“Protector.” “If at the time there be a tenant in tail of lands under a settlement, and there be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the

(a) Banning's Limitation of Actions, p. 114.

(b) Act respecting the Assurance of Estates Tail (Revised Statute, cap. 100, secs. 1 & 10).

estate tail, then the person who is the owner of the prior estate shall be the protector to the settlement.

“It was one of the propositions of the Real Property Commissioners, that on any alienation by a tenant in tail, by any assurance not operating as a complete bar to the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of it, possession under such assurance should have the same effect in barring the estate tail, and all estates, rights and interests so limited, as if such possession had been adverse to the estate tail, or to such estates, rights and interests.” (a)

Lord St. Leonards, in his work on the Real Property Statutes, says: “These intentions were carried into effect by the enactment in the 23rd section before quoted, which requires a possession or receipt for twenty years next after the commencement of the time at which such assurance, if it had then been executed by the tenant in tail, or the person who would have been entitled to his estates tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, at the end of which twenty years such assurance is made effectual against any claimant after or in defeasance of such estate tail. The assurance referred to is the one made by the tenant in tail. The operation of the clause therefore is not strictly to make time a bar, but to make time give a full operation to the assurance executed by the tenant in tail.”

Mr. Banning says: “Having thus considered those cases which fall strictly within the letter of the Act where the tenant in tail has made an assurance which is defective only through the non-concurrence of the protector, we shall now proceed to examine those cases where the tenant in tail is out of possession, having made an assurance which is entirely defective against his successors. Now, as we have seen, if

(a) Banning's Limitation of Actions, p. 114.

a tenant in tail simply abandons possession, the issue in tail and remainder-men (so far as he could lawfully have barred the latter) would lose their rights in twenty years from such abandonment. On the contrary, where the tenant in tail has conveyed away his interest, so that as far as he is concerned the possession of his assignee is not adverse, time will not run during the life of such tenant in tail. (a)

“This is already shewn in *Cannon v. Rimington*. In that case a tenant in tail had made a feoffment of the land to a third person, and more than twenty years elapsed during his life without any interruption of the possession of the feoffee or those claiming under him; and upon a succeeding tenant in tail taking proceedings, it was contended by the defendant that the plaintiff was barred by the Statute; but the Court *held* that, though if the tenant in tail had been dispossessed, and so had a right of entry for more than twenty years, his successor would be barred, yet, as by his feoffment he had deprived himself of his right of entry during his life, the statute did not apply.” (b)

The most important, and, in fact, almost the only case in Ontario on this point, is *In re Shaver*, 3 Chy. Chambers, 379.

In this case, one Harris Shaver made a will, entailing certain land to his second son George. George sold, conveying to petitioner's father in fee, and received value for it. The contestant was the son of George. Petitioner's father purchased in March, 1846, and purchased from Jacob Brouse and George Shaver. Deed was only made by George Shaver of the whole lot. Petitioner and his father went on the lot in 1846, and had been in possession more than twenty years. It was *held*, that as to the twenty-five acres that Jacob Brouse was in possession of, the petitioner received both a legal and equitable title by length of posses-

(a) *Cannon v. Rimington*, 12 C. B. 1; 21 L. J. C. P. 137.

(b) Banning's Limitation of Actions, 115, 116. *Vide* remarks of Lord Chancellor in 12 C. B. 16.

sion; as to the rest of the land that contestant's father had tried to convey, the Statute did not begin to run till the death of his, contestant's father.

Mowat, V. C., says: "As to the petitioner's claim under the Statute of Limitations, if I am to assume that George Shaver was in possession of the one hundred acres when he conveyed to the petitioner's father, and that he then gave up to him possession of the whole, the cases in C. B. 12, p. 1, *Cannon v. Rimington, &c.*, shew that the Statute did not begin to run against the contestant until his father died. Though there is a difficulty in understanding why in principle such a distinction should exist, still the Statute did make a distinction between a case where a tenant in tail should voluntarily abandon his interest during his life, and remain out of possession for twenty years, and a case where he should convey his interest, and thereby put it out of his power to make an entry or bring an action; that in the former case the issue was barred, and that in the latter (which is the present case) time was not to run against the issue until the death of the tenant in tail. The conveyance by George Shaver was executed shortly before the disentailing Act came into force."

It would appear that the principle seems to be this, that the tenant in tail, by his deed in the latter case, takes away from his issue in tail the right of entry during his life, while in the former case the right of entry arises on the abandonment of the tenant in tail. Then the Statute begins to run.

Our present disentailing Act would do away with any such trouble, but the remarks of the learned Vice Chancellor are so applicable to this country, that I cannot forbear quoting them. "The inalienability of estates tail is entirely opposed to the spirit of a free people; and the want of machinery for alienating such estates was temporary only. Such machinery, I apprehend, existed until the abolition of real actions in 1834; and at the time of the transaction in

question, the bill was probably before the Canadian Parliament which was passed into law on the 18th May, 1846, enabling the alienation to be effected by a simple conveyance. It has always been the rule in England, that a tenant in tail who contracts to sell or charge the fee simple, may be compelled to do whatever is necessary to give the purchaser a title to the fee simple. (a)

“And the contestant’s father could have been compelled in this country, at any time after the 18th May, 1846, until his death sixteen years afterwards, to execute a new conveyance which would have perfected the petitioner’s title (b). I think the contestant’s silence was a disclaimer of his right, and an acquiescence in the petitioner’s title to the fee simple.” *Re Shaver*, 3 Chy. Chambers, *infra*.

LIMITATION OF SUITS IN EQUITY.

29. No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively if he had been entitled at law to such estate, interest or right, in or to the same as he claims therein in equity. C. S. U. C. cap. 88, s. 31.

This section is taken from the Imperial Statute 3 & 4 Will. IV. cap. 27, s. 24.

It not only puts in statutory form and gives the force of law to a well-known principle that equity follows the law, but under this, Courts of Equity may be said to act in obedience to the Statutes of Limitation. Lord Redesdale holds thus in *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629. (c)

(a) See Sugden’s Vend. & Pur. 205, 468, 14th Edit.

(b) See *Smith v. Baker*, 1 Y. & C. C. C. 223; *Osborne v. Smith*, 4 Ir. Chy. 58; and other cases cited, Sugden, 744, *et seq.*; Dart, 740, 4th Edit.

(c) *Hollingshead’s Case*, 1 P. W. 743; *South Sea Co. v. Wymondsell*, 3 P. W. 143; *Edsell v. Buchanan*, 2 Ves. 83; *Cholmondoley v. Clinton*, 3 Jac. & Walk. 56.

“Thus there was no limit in equity to the recovery of a rent charge at a time when no bar existed by Statute.” *Archbold v. Scully*, 9 H. L. C. 360.

This Statute was intended to put an end altogether to the discretion of Courts of Equity in those cases where they had before acted by analogy to the time limited at law. That was an analogy founded both in law and good sense, but it no longer remains in the discretion of the Court, but is incorporated in the Statute. *Barrington v. Evans*, 1 Y. & Coll. 439, 440. These Courts by their own rules, independently of any Statutes of Limitation, give great effect to length of time, and refer frequently to those Statutes for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity of any particular demand. 17 Ves. 97. Time is a bar in equity to stale demands independent of the Statute. A bill filed by a tenant for life in remainder against the representative of a prior tenant for life for an account of timber improperly cut, was dismissed with costs on account of the delay, the bill not having been filed until *nearly* twenty years after the death of the first tenant for life. *Harcourt v. White*, 28 Beav. 303.

Equitable waste was decreed against the estate of a tenant for life thirty-eight years after the waste was committed, the title of the plaintiff as remainder-man in tail having accrued within twenty years before the filing of the bill. *Duke of Leeds v. Earl Amherst*, 2 Phill. 117; *Morris v. Morris*, 4 Jur. N. S. 964.

Legal Waste.—Where a tenant for life impeachable for waste commits legal waste by wrongfully cutting timber, time runs against the remainder-man from the time of the cutting, and it appears that the period of limitation is six years. *Seagram v. Knight*, L. R. 2 Chy. 628; *Higginbotham v. Hawkins*, L. R. 7 Chy. 671; *Birch Wolfe v. Birch*, L. R. 9 Eq. 633.

According to Lord St. Leonards, a bill of foreclosure is not a suit in equity for the recovery of the money charged upon the land; but is, in effect, a suit to obtain the equity of redemption, which is, in view of equity, an actual estate. The time is therefore governed by the legal right to bring an action. *Wrixon v. Vize*, 3 Dru. & War. 104; Sugd. R. P. Stats. 94, 121, 2nd Edit. See, however, *Dearman v. Wyche*, 9 Sim. 570; Shelford's R. P. Stats. 237, 8th Edit. See in Ontario Courts, judgment of Chief Justice Moss in *Allan v. McTavish*, *infra*, pp. 108-118.

As to the effect of proceedings in equity in preventing the operation of the Statute, see Shelford's R. P. Stats. pp. 199, 200, 8th Edit.

30. Where any land or rent is vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him to bring a suit against the trustee, or any person claiming through him to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. C. S. U. C. cap. 88, s. 32.

This section is taken from section 25 of 3 & 4 Will. IV. cap. 27.

“An express trust is a trust which is clearly expressed by the author thereof, whether verbally (?) or by writing, and may be either executed or executory in the sense of directory. A trust is said to be executed when no act is necessary to be done to give effect to it, the trust being finally declared by the instrument creating it, as where an estate is conveyed to A. in trust for B.”

A mere direction, however, to convey upon certain trusts, will not render trusts executory in the sense of directory. “All trusts,” observes Lord St. Leonards, “are in a sense executory, because a trust cannot be executed except by conveyance, and therefore there is something always to be done.

But that is not the sense which a Court of Equity puts upon the term ‘executory trusts.’ A Court of Equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner. Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the Court to make out from *general expressions* what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into *legal estates*? (a)

“It is a well known principle both as to personalty and realty, and in the case of real property one confirmed by Statute, that *time does not create a bar in case of trust*. There are, however, many ways in which the term *trust* is used, and the doctrine requires some qualification. Thus, it is said that a trust, to be within the saving of this principle, must be, in the first place, direct or express; and secondly, of a nature not cognizable at law, but solely in equity. There is too a third qualification of the doctrine, viz., that it applies (at all events in its universality) only between the trustee and his *cestui que trust* (b). As a fact, indeed, every case of deposit or bailment in a certain way creates a trust; but the trusts excluded from the operation of the efflux of time are those technical and continuing trusts which were not cognizable at common law (c), and where the plaintiff has no legal title, the estate at law being in the trustee.” (d)

Should a trustee distinctly and openly repudiate his trust, and assume to own absolutely, he may commence to acquire a title by a chance possession against his *cestui que trust*. (e)

(a) *Egerton v. Brownlow*, 4 H. L. C. 210; Snell’s Prin. of Eq. 48.

(b) Angell’s Limitation of Actions, chap. xvi.; Story’s Eq. Jurisprudence, 1520, n. (1); *A. G. v. Fishmongers’ Co.* (Preston’s Will.) 5 M. & Cr. 16; *Wedderburn v. Wedderburn*, 4 My. & Cr. 41; *Bridgman v. Gill*, 24 Beav. 302.

(c) *Lockey v. Lockey*, Preced. Chy. 518.

(d) Banning’s Limitation of Actions, 187.

(e) Angell’s Limitation of Actions, 165, 5th Edit.

The same principle holds good in the Civil Law (*a*), and in the Code of Lower Canada. (*b*)

This section distinctly allows time to run against the *cestui que trust* in favour of a purchaser for value, and this, too, although the purchaser has notice of the trust in cases falling within the words of the Statute. (*c*)

In cases, however, where the consideration was manifestly inadequate, it is presumed that the Court would grant relief on the principle of relief against fraud.

“A difficult question arose on the construction of 3 & 4 Will. IV. cap. 27, as to whether section 25, by which the saving in favour of express trust is created, extends to the subjects dealt with in sections 40 and 42 of the Act, namely, to money charges on land or rent. It was at one time held otherwise in Ireland (*d*), but this view was not upheld by the House of Lords (*e*), and it is now established that when land or rent is vested in trustees upon express trust to raise legacies, annuities or other charges, time will not run as

(a) *Vide* French Code, ss. 2236–2239.

(b) Code Lower Canada, 2203.

(c) *Law v. Bagwell*, 4 Dru. & War. 398; *Townsend v. Townsend*, 1 Br. C. C. 557; Civil Code of Lower Canada, 2203: “Those who possess for another, or under acknowledgment of a superior domain, never *prescribe* the ownership even by the continuance of their possession after the term fixed. Thus emphyteutic lessees, tenants, depositaries, usufructuaries, and those who hold precariously the property of another, cannot acquire it by prescription. They cannot by prescription liberate themselves from the obligation of paying dues attached to their possession, but the measure of such dues and any arrears thereof are prescriptible. Emphyteusis, usufruct and other like proprietary rights, are susceptible of a distinct ownership, and of a possession available for prescription. The proprietor is not hindered by the title which he has granted from prescribing against these rights. He who has been put in definitive possession of the property of an absentee, only begins to prescribe against him or his heirs or legal representatives when such absentee returns, or his death becomes known or may be legally presumed.”

(d) *Knox v. Kelly*, 6 Ir. Eq. Rep. 279; *Burne v. Robinson*, 1 Dru. & Walsh, 683.

(e) *Burrowes v. Gore*, 6 H. L. C. 907.

between trustee and *cestui que trust* as to any part of the principal or interest of such charges (a), at all events as long as the land remains in specie. *Mutlow v. Bigg*, L. R. 1 C. D. 385; *Pawsey v. Barnes*, 20 L. J. Chy. 393; Banning's Limitation of Actions, 189.

In Ontario the point came up in the case of *Tiffaney v. Thompson*, 9 Chy. 244, and the Chancellor Vankoughnet speaks as follows at page 253: "The Statute of Limitations, with regard to legacies, had for a long time been a puzzle, but I think the true solution is to be found in the case of *Watson v. Saul*, 1 Giffard, 188. The Vice-Chancellor there, after a review of all the preceding decisions of any importance, declares the distinction to be, that when a beneficial interest in property is conveyed to a party charged with the payment of a legacy, that then section 24 of our Act (section 23 of this present Act) will govern, for then it is in reality a mere charge on land; but that when property is conveyed to trustees upon the express trust that out of it a legacy shall be paid, that then section 32 of our Act (30 of the present Act) removes the period of limitation. This construction is consistent with common sense and equity, and affords the means of giving to both clauses of the Act operation in regard to legacies, and I accordingly adopt it. See also *Bright v. Larcher*, 27 Beav. 130; *Obee v. Bishop*, 1 De G. F. & J. 137. See also the cases cited in the judgment: *Leonard v. Leonard*, 2 B. & B. 171; *Broderick v. Broderick*, 1 P. W. 239; *Cann v. Cann*, 1 P. W. 727.

"It is a well known rule that as between *cestui que trust* and trustee in the case of a direct trust, no length of time is a bar; for, from the privity existing between them, the possession of the one is the possession of the other, and there

(a) *Ward v. Arch*, 12 Sim. 472; *Young v. Lord Waterpark*, 12 Sim. 204, 10 Jur. 1 & 15, L. J. Chy. 63; *Cox v. Dolman*, 2 De G. M. & G. 592; *Codrington v. Foley*, 6 Vesey, 364; *Lawton v. Ford*, L. B. 2 Eq. 104; *Mutlow v. Bigg*, L. R. 18 Eq. 246.

is no adverse title (a). It has hence been argued that as the person into whose hands the estate is followed is also by construction of law a trustee, the *cestui que trust* is entitled to the benefit of the rule, and is not precluded by mere lapse of time from establishing his claim. But the authorities shew that this doctrine cannot be maintained." (b)

This present section effectually puts a stop to any question on that point.

"The rule that the Statute of Limitations does not bar a trust estate," says Lord Hardwicke, "holds only as between *cestui que trust* and trustee, not as between *cestui que trust* and trustee on the one side and strangers on the other, for that would make the Statute of no force at all, because there is hardly any estate of consequence without such trust, and so the Act would never take place. Therefore, where a *cestui que trust* and a trustee are both out of possession for the time limited, the party in possession has a good bar against them both." (c)

Lord Manners says, in *Pentland v. Stokes*, 2 B. & B. 75, "If trustees neglect their duty, and suffer an adverse possession of twenty years to be held, I apprehend that the Statute of Limitations is a bar to the *cestui que trust*."

Acknowledgment of a Debt by a Trustee.—As a general rule, the acknowledgment of a debt by a trustee will be binding on the *cestuis que trustent*. *Toft v. Stephenson*, 1 De G. M. & G. 41.

A security by way of a trust for sale is to be regarded as an ordinary mortgage in reference to the Statute of Limitations. *Locking v. Parker*, L. R. 8 Chy. 30; *Yardley v. Holland*, L. R. 20 Eq. 428.

(a) *Chalmers v. Bradley*, 1 J. & W. 67; *Bennett v. Colley*, 2 M. & K. 232; *Llewellyn v. Mackworth*, Barn. 449; *Wilson v. Moore*, 1 M. & K. 146.

(b) Lewin on Trusts, 704, 6th Edit.; *Townshend v. Townshend*, 1 B. C. C. 550; *Bonney v. Redgard*, 1 Cox, 145.

(c) *Llewellyn v. Mackworth*, 2 Eq. Ca. Ab. 579; s. c. Barn. 445.

In *McFadden v. Stewart*, 11 Chy. 272, leave was given to amend with a view of shewing that certain lands held by the deceased partner, and which had descended to his heir at law, had been purchased with partnership assets, and therefore there was a resulting trust in favour of plaintiff.

“The effect of the 25th section of 3 & 4 Will. IV. cap. 27 (the present section of Ontario Statutes now under discussion), is that as between the trustee and any person claiming through him, and the *cestui que trust* and any person claiming through him, time does not run until there has been a conveyance to a purchaser for valuable consideration. The trust estate may therefore be followed by the *cestui que trust* notwithstanding acquiescence by him (*a*), not only as against the trustee, but against all volunteers claiming under him (*b*); but so soon as the estate is conveyed to a purchaser for valuable consideration, as if it be made the subject of a marriage settlement, the time begins to run (*c*), and a lease for value is *pro tanto* a conveyance within the meaning of the Act (*d*). No possession by a purchaser short of the statutory period will be a bar.” (*e*)

This section applies only to *express trusts*. “Trusts, as regards the provisions of the Statute, may be divided into *express trusts* and *constructive trusts*; the former arising from the language of some written instrument, and the latter, such as are elicited by the principles of a Court of Equity from the actions of the parties.” (*f*)

(*a*) *Browne v. Radford*, W. N. 1874.

(*b*) *Sturgis v. Morse*, 24 Beav. 541, 3 De G. & Jones, 1; *Heenan v. Berry*, 2 Jones & Lat. 303; *Salter v. Cavanagh*, 1 Dru. & Walsh, 668; *Blair v. Nugent*, 3 Jones & Lat. 668, 9 Ir. Eq. Reports, 400; *Ravenscroft v. Frisby*, 2 Cole, 16; *Massy v. O'Dell*, 10 Ir. Ch. Rep. 22; *O'Reilly v. Walsh*, 6 Ir. Eq. Rep. 555; *Dixon v. Gayfere*, 17 Beav. 421.

(*c*) *Petre v. Petre*, 1 Drew. 371.

(*d*) *Attorney-General v. Davey*, 4 De G. & J. 136; *Attorney-General v. Payne*, 27 Beav. 168.

(*e*) *Attorney-General v. Flint*, 4 Hare, 147; Lewin on Trusts, 718.

(*f*) Lewin on Trusts, 719.

In *Commissioners of Charitable Donations v. Wybrants*, 2 Jones & Lat. 197, *held*, it is not necessary to use the word *trust* in order to create an express trust. “If, therefore, land be devised to a person on trust to receive the rents, and thereout to pay certain annuities, the surplus rents result to the heir at law upon the face of the instrument, and this being an express trust, the heir at law is not barred by any length of possession by the trustee.” (a) In *Lord St. John v. Boughton*, 9 Sim. 223, where there was an express trust to sell and pay debts, the V. C. E. thought that as *no part of the produce of the sale had been set apart for debts*, the case was not within the exception of the 25th section, but fell under the 40th, and that if there had been no subsequent acknowledgment, it could not have been recovered. This case was decided on the ground that there was an acknowledgment. Lewin on Trusts, 719. But see *Watson v. Saul*, 1 Giff. 197.

But trusts arising by the construction of a Court of Equity from the acts of parties, or to be made out by circumstances, or to be proved by evidence, will not be saved by the clause relating to express trusts, as, if the devisee for life of a leasehold estate renew in his own name, the statute will begin to run from the time of the renewal.” (b)

It will be noticed that in cases of a purchaser, this section makes time a bar, and this will be the case though the purchaser have knowledge of the trust (c). “The actual date of the execution of the conveyance is the date from which time commences to run (d). If a trustee on his marriage includes his *cestui que trust* property in his marriage settlement, it appears that this is a conveyance for valuable consideration, so far as the consideration extends.” (e)

(a) *Salter v. Cavanagh*, 1 Dru. & Walsh, 668 ; 7 Ir. Eq. Rep. 580 ; *Mutlow v. Bigg*, 18 L. R. Eq. 246 ; Lewin on Trusts, 719.

(b) *Petre v. Petre*, 1 Drew. 371 ; *In re Scott*, 8 Ir. Chy. Rep. 316.

(c) *Law v. Bagwell*, 4 Dru. & War. 298 ; *Townsend v. Townsend*, 1 Br. C. C. 557.

(d) *A. G. v. Flint*, 4 Hare, 147.

(e) *Petre v. Petre*, 1 Drew, 371. Banning's Limitation of Actions, 190.

The trust must be clear. (*a*)

“The saving as to express trusts applies between *co-cestuis que trustent* as well as between trustee and *cestui que trust*.” (*b*)

In *Harris v. Harris*, 29 (No. 2) Beav. 110, if one *cestui que trust* has been overpaid, he is liable to account to a *co-cestui que trust*. A mere power is not a trust (*c*), and therefore an executor with power to sell real estate charged with debts is not a trustee within the saving of the Statute.

The case of *Brittlebank v. Goodwin*, L. R. 5 Eq. 545, decided (overruling several prior decisions) that the exception against the trustee applied also to the executor of the trustee; but in cases of great delay, the Court has refused relief. (*d*)

There are two exceptions to the rule that no lapse of time will give a *cestui que trust* in possession a title against his trustee. First exception: rule applies only where the *cestui que trust* is the actual occupant himself, and not where his assignees or others are in possession (*e*). Secondly: the trust must be express, and a merely constructive trustee in possession, such, for instance, as a purchaser holding under an agreement to purchase, is not so affected with any trust as to be unable to take advantage of the Statute.”

With regard to executors and personal property, see Banning's Limitation of Actions, pp. 195–199.

31. In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent which he,

(*a*) *A. G. v. Fishmongers' Co.*, 5 My. & Cr. 16.

(*b*) *Knight v. Bowyer*, 2 De G. & J. 421, 4 Jur. N. S. 569, 28 L. J. Chy. 54; *Ward v. Arch*, 12 Sim. 472; *Young v. Lord Waterpark*, 13 Sim. 199. *Cox v. Dolman*, 2 De G. M. & G. 592; *Garrard v. Tuck*, 8 C. B. 231.

(*c*) Banning's Limitation of Actions, 191; *Dickenson v. Teasdale*, 14 De G. J. & S. 52; but see *Jacque v. Jacquett*, 27 Beav. 332.

(*d*) *Bright v. Legerton* (No. 1), 29 Beav. 60.

(*e*) *Blight's Lessees v. Rochester*, 7 Wheat. (U. S.) 535; *Melling v. Leak*, 16 C. B. 652; *Stanway v. Rock*, 4 M. & Gr. 30; Banning's Limitation of Actions, 194.

or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before the time at which such fraud was, or with reasonable diligence might have been, first known or discovered. C. S. U. C. cap. 88, s. 33.

This section is taken from the Imp. Act, 3 & 4 Will. IV. cap. 27, s. 26.

Fraud has always been a ground of relief, not only as against the perpetrator of the fraud, but also as against his assigns, his children, and his children's children. (a)

“The reason offered by Lord Redesdale why, if fraud had been concealed by one party, and until it has been discovered by the other, the Statute should not operate as a bar, is this: that the Statute ought not *in conscience* to run, the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time.” (b)

Although in former times it was held that fraud would not at law prevent the operation of the Statute, however great or carefully concealed, but that it was necessary to go into equity, yet at present, under the Administration of Justice Act, relief may be obtained in any court, and the equitable rights administered. With regard to the jurisdiction and practice under the Administration of Justice Act, see the judgment of the Court of Appeals in *St. Michael's College v. Meyrick*, Appeal Reports, Vol. I.; No. 5, Can. L. J. 1877, p. 239.

“Such fraud as will in equity prevent the bar of the Statute, must be distinct in its characteristic (c), and mere wrongful entry or possession is not equivalent to fraud unless there is designed concealment of important circumstances from the rightful owner. It has been decided that possession through a conveyance from a lunatic is not of

(a) *Hagerman v. Beasley*, 14 Vesey, 273; *Bridgman v. Greene*, Wilmot's Notes, 58. Banning's Limitation of Actions, 217.

(b) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 634.

(c) *Petre v. Petre*, 1 Drew. 397; *Dean v. Thwaite*, 21 Beav. 621.

itself evidence of fraud (*a*). But it would be otherwise if *mala fides* were proved on the part of the purchaser (*b*). Where a fine was levied with proclamations by a person aware of a flaw in his title, it was considered not a case of fraud, so as to take the case out of the then existing Law of Limitations. (*c*)

“It will be observed that the exception introduced by this section applies only in the case of concealed fraud. And further, so long only as with due diligence the fraud could not have been detected. Therefore, in *Chetham v. Hoare*, where a register book containing a certificate of marriage which formed a principal link in the title of the plaintiff had been fraudulently mutilated, as was alleged in the bill by one Edward Chetham, counsellor at law, yet it was held by Malins, V.-C., on demurrer, that the fraud could have been discovered earlier with proper diligence, and that the bill was too late (*d*). In this case the claim had, in fact, lain dormant for nearly one hundred and fifty years. Where an estate was intentionally omitted from an insolvent’s schedule, it was considered an instance of concealed fraud. (*e*)

“The Court will not enter into the question how far a fraud has been in effect concealed, owing to the exceptional dulness of the lawful claimant’s intellect. (*f*)

“Where the question of fraud is raised, but there is a doubt of the existence of such fraud, the Court will not be inclined to presume it at a great distance of time, but will require strong *prima facie* evidence (*g*). ‘Length of time,’ said Mr. Justice Story, in an American case, ‘necessarily

(*a*) *Price v. Berrington*, 3 Mac. & G. 486; *Manby v. Bewicke*, 3 K & J. 342.

(*b*) *Lewis v. Thomas*, 3 Hare, 26.

(*c*) *Langley v. Fisher*, 9 Beav. 90; 15 L. J. Chy. 73. And see *Bellamy v. Sabine*, 2 Ph. C. C. 425.

(*d*) *Chetham v. Hoare*, L. R. 9 Eq. 571.

(*e*) *Sturgis v. Morse*, 24 Beav. 541.

(*f*) *Manby v. Bewicke*, 3 K. & J. 342; *Bridgman v. Gill*, 24 Beav. 302.

(*g*) *Charter v. Trevelyan*, 4 L. J. N. S. Chy. 239, 11 Cl. & Fin. 714; *Bonney v. Ridgard*, cited in 17 Ves. 97.

obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transaction, it operates by way of presumption in favour of innocence and against the imputation of fraud.’ (a)

“It will be seen that an innocent purchaser for value is, by the 26th section of the Act Will. IV. protected against the claims which the rightful owner might have otherwise prosecuted, on the ground of original fraud by those from whom such a purchaser claims. The effect of the section seems to be to strike out the fraud altogether as against such purchaser, so that he is at once protected on making his purchase if the legal time has expired previously to his purchase.

“An innocent person claiming under a marriage settlement without notice is no doubt a purchaser for value; and the express wording of the section seems to point to something more than constructive notice; in fact, to some personal knowledge on the part of a person who claims protection as such a purchaser in order to defeat his claim (b). But with reference to that question, James, L. J., in delivering the judgment of the Court in *Vane v. Vane* (c), remarks as follows: ‘It appears to us beyond all question that, as the law of this court stood when the Statute was passed, the knowledge of the purchaser’s agent, acquired in the course of the transaction, was for all purposes treated as the knowledge of the principal. It is also, we conceive, beyond question that, in every case except under this section, the Court would treat the knowledge of the purchaser’s agent as the knowledge of the purchaser. Was it, then, meant to make such a material alteration in the law? It is said in support of that (and not without force), that the words well known to the Court, ‘purchaser for valuable consideration without notice,’ were designedly not used, and the words, ‘who had not

(a) *Prevost v. Gratz*, 6 Wheat. (U.S.) 481. In *The Marquis of Clanricarde, v. Henning*, 30 Beav. 175, a bill to impeach a purchase by a solicitor from his client was considered too late after a lapse of more than forty years.

(b) *Vane v. Vane*, L. R. 8 Chy. 383.

(c) *Ibid.*

participated in the fraud, and did not know, and had no reason to believe,' were designedly introduced, so that only those purchasers should be affected who had actual knowledge, and who were, in truth, making themselves morally accomplices in the fraud, in fact, receivers of stolen goods. But we think that what the Legislature meant to do was to exclude that constructive notice, which had certainly been carried to a very startling extent in many instances, and that it did not mean to subvert, in respect of one small portion of the law of this court, the well settled principles and rules on which all the courts have acted in respect of the relation of principal and agent, and in respect of the extent to which the knowledge of the latter is deemed to be the knowledge of the former. The Courts had, in fact, held, almost in so many words, that what the agent knows the principal knows, that the knowledge of the agent was sufficient to create *mala fides* in the principal, and we think it therefore reasonable to hold that the Legislature used the words in the same sense, and that when they said, 'who did not know, or had not reason to believe,' they meant, 'who did not know or had not reason to believe either by himself or by some agent, whose knowledge or reason to believe is by settled law deemed and taken to be his.' We think it would lead to very startling consequences if any other interpretation were put upon the clause. It is obvious that if actual personal knowledge were required, every corporation or jointstock company might acquire a good title to property, although its officers and solicitors were perfectly conversant with the grossest fraud perpetrated by the vendor; and, in fact, any person might deal with impunity in the purchase of what is in substance stolen property, provided he takes care to leave the whole dealing from first to last in the hands of his agent.'" (a)

The cases in Ontario go far to maintain the Statute of Limitations, and I refer the reader to *Butterfield et al. v. Mabee et al.*, 22 C. P. 230.

(a) Banning's Limitation of Actions, 219-223.

A. and B. being the owners in fee of certain lands, sold them to C., and in 1836 executed conveyances, but continued in possession as before. In 1850, D. claiming to hold a deed for the lands executed by the heir at law of C., then dead, got possession of the lands from A. and B. under the belief that he was the grantee of C.'s heir at law. D. then conveyed the lands to defendants or to persons under whom they claimed. These went into possession in 1850 or 1851, and continued in possession till 1868, when the real heiress of C. brought ejectment against them who claimed by possession. It appeared that the deed executed by D. was a *fraudulent* instrument not executed by C.'s heir at law, but by some stranger. *Held*, that the title of C. was barred by the Statute of Limitations. See also *Graham v. Moore* 4 Serg. & Rawle. 467; *Doe Cuthbertson v. McGillis*, 2 C. P. 124–150; *Burrowes v. Gates*, 8 C. P. 121; *Wright v. Rankin*, 18 Grant, 625; *Duchess of Kingston's case*, 2 Sm. L. C. 680, 6th Edit. Taylor's Evidence; *Doe Burwell v. Turner*, 9 M. & W. 643; *Asher v. Whitlock*, L. R. 1 Q. B. 1. See also *Doe Miller v. Tiffany*, 5 U. C. 79.

In this case (*Butterfield v. Maybee et al.*, 22 C.P. 230), Chief Justice Hagarty remarks: "The Statute of Limitations (at least in a country like ours) has worked most beneficially for the quieting of titles. I think the present is hardly a case for extending or straining the well settled legal causes which prevent or suspend its operation."

Whether the Court of Chancery did not "strain the well settled legal causes which suspend its operation," in the next case may be a subject of interesting inquiry.

The case of *Latham v. Crosby*, 10 Chy. p. 308, may be of interest in this connection. "L., as daughter of a U. E. Loyalist, had been granted a lot of land, but left Canada for the United States in 1825, where she had resided ever since. Various persons took possession of the land, and improved it so that it was worth £2,500. Crosby sent his agent, Ketchum, to L. in Michigan to treat for the purchase

of plaintiff's interest. This agent made numerous false representations as to the position and value of the land, and as to the intentions of his principal, and thereby induced L. to convey her interest in the land to C. for an inconsiderable sum. On a bill filed to set aside this conveyance, *held*, that the representations made by the agent were material, and to be considered in weighing the *bona fides* of the contract, which was ordered to be cancelled."

The general principle with regard to fraud is this, "that the rules of the Court are the rules of honesty and fair dealing, and that no party to an illegal or fraudulent contract can derive any benefit from it; and that all persons who obtained possession of trust funds with a knowledge that their title is derived from a breach of trust, will be compelled to restore such trust funds." (a)

This section says: "In every case of a concealed fraud," no time will cover a fraud as long as it remains concealed (b). After discovery time begins to run. *Vide Hovenden v. Lord Annesley*, 2 Sch. & Lef. 634; *Western v. Cartwright*, Sel. Ch. Ca. 34; *Mulcahy v. Kennedy*, 1 Ridge, 337.

It appears to be laid down in *Lewin on Trusts*, p. 711, that if defendant has not in some way pleaded the Statute, he cannot shelter himself under it, but it is supposed that in Ontario, in analogy with the decision in the case of *Gilleland v. Wadsworth*, where the Registry Laws were not pleaded, it would not be necessary to plead the Statute of Limitations. See also *Prince v. Heylin*, 1 Atk. Rep. 494. *Lewin on Trusts* says, p. 711: "Even when the bill charges fraud, the defendant may demur or plead according to the circumstances of the case (a). If the plaintiff allege that he

(a) *Gray v. Lewis*, 8 L. R. Eq. 526; *Lewin on Trusts*, 704.

(b) *Blair v. Bromley*, 2 Phill. 354; *Rolfe v. Gregory*, 11 Jur. N. S. 97; s. c. 4 De G. Jon. & Sm. 576; *Coterel v. Purchase*, cas. t; *Talbot*, 63, *per* Lord Talbot; *Medlicot v. O'Donel*, 1 B. & B. 166, *per* Lord Manners; *Arran v. Frawley*, cited, *Lewin on Trusts*, 170; *Allen v. Gregory*, 2 Eden, 280; *Morse v. Royal*, 12 Ves. 374; *Lewin on Trusts*, 710.

only discovered the fraud within the period limited by the Statute, the defendant must by plea either deny the fraud or insist that the plaintiff had knowledge of it."

32. Nothing in the last preceding section shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bona fide* purchaser for *valuable consideration*, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know, and had no reason to believe that any such fraud had been committed. C. S. U. C. cap. 88, s. 34.

This is the latter part of the section 3 & 4 Will. IV. cap. 27, sec. 26.

The system adopted in Ontario of dividing the long English sections into two or three smaller sections, is worthy of notice. It renders the study of Statute Law, at no time very interesting or entertaining, a little clearer, and more easily understood.

Most of the cases therefore, and remarks on section 31, will be applicable to section 32.

This section does not interfere with the rules of Chancery, or take away the right of a *cestui que trust*, to follow the estate into the hands of a stranger to whom it has been tortiously conveyed.

"If the alienee be a volunteer, than the estate may be followed into his hands whether he had notice of the trust or not." (b)

Our Statute with regard to voluntary conveyances would perhaps cure any ruling of the Court that the "estate could be followed into the hands of a volunteer whether he had notice or not." Revised Statutes, cap. 95, ss. 11 & 12.

(a) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 637; *Deloraine v. Brown*, 3 B. C. C. 633; *Hoare v. Peck*, 6 Sim. 51; Mitford on Pleading, 4th Edit. 269.

(b) *Mansell v. Mansell*, 2 P. W. 678; *Saunders v. Dehew*, 2 Vin. 271; *Langton v. Astrew*, 3 Chy. Rep. 30, Ves. 126.

“Notwithstanding the provisions of the Statute passed in the 27th year of the reign of Her late Majesty Queen Elizabeth, and chaptered four, no conveyance, grant, charge, lease, estate, incumbrance, limitation of use or uses which is executed in good faith, and duly registered in the proper Registry Office before the execution of the conveyance to, and before the creation of any binding contract for the conveyance to any subsequent purchaser from the same grantor of the same lands, tenements or hereditaments, or any part or parcel thereof, or any rent, profit or commodity in or out of the same shall be, or be deemed or taken to be, merely by reason of the absence of a *valuable consideration*, void, frustrate or of none effect as against such purchaser, or his heirs, executors, administrators or assigns, or any person claiming by, from or under any of them.” 31 Vic. cap. 9, s. 1.

The fact of his taking voluntarily would not be considered proof that he had notice.

How far Registration would be notice, and whether it is necessary to plead the Registry Laws, are questions which appear to be answered in the case of *Gilleland v. Wadsworth*, Appeal Reports, Vol. I. 82, which was tried before Chancellor Spragge in St. Catharines, reported in 23 Grant, 547. The Chancellor dismissed the bill, not having allowed an amendment to the bill for the purpose of pleading the Registry Laws. The case came up in the Court of Appeals before Burton, Patterson and Moss, J.J. A., and Blake, V. C.

The Hon. Justice Moss, in delivering the judgment says, p. 91: “The registration of the assignment would not be notice to Brown, because a mortgagor paying off his mortgage does not come within the class of persons to whom registration constitutes notice. But Wadsworth was expressly within the terms of the Statute, for he was a person claiming an interest in the land subsequent to the registry of the assignment. He became a purchaser of this land while an assignment of the mortgage stood registered.”

And on p. 92: "The issue was whether Wadsworth had notice, and not whether his assignment was registered. The registration is merely the evidence by which the plaintiffs sought to prove notice, and the plaintiff is not in equity, any more than at law, required as a rule to plead evidence."

Blake, V. C., in the same case, p. 99, says: "Junkin was no party to the transaction. He had done all that the law requires him by *publicly notifying, through the registry office*, all desiring to deal with this land, that he was the holder of a mortgage on it."

If the alienee be a purchaser of the estate at its full value, then if he take with notice of the trust, whether the notice be actual or constructive (*a*), and notwithstanding the Statute of Limitations, which does not apply to a person taking with notice and therefore taking by fraud (*b*), he is barred to the same extent and in the same manner as the person of whom he purchased (*c*); for knowing another's right to the property, he throws his money away voluntarily and of his own free will. (*d*)

And the rule applies not only to the case of a trust properly so called, but to purchasers with notice of any equitable incumbrance, as of a covenant or agreement affecting the estate (*e*), or a lien for purchase money. (*f*)

In 1825, A. on his insolvency omitted from his schedule (which he verified on oath) an estate to which he was entitled. In 1853 his assignee filed a bill against the assignors under a subsequent bankruptcy, and others for

(*a*) *Bourset v. Savage*, 2 L. R. Eq. 134.

(*b*) *Rolfe v. Gregory*, 11 Jur. N. S. 98; *Hartford v. Power*, 2 Ir. Rep. Eq. 204.

(*c*) *Dunbar v. Tredennick*, 2 Ball & B. 319; *Paulet v. Atty.-Gen.* Hard. 465.

(*d*) *Meades v. Lord Orrery*, 3 Atk. 238.

(*e*) *Daniels v. Davidson*, 16 Ves. 249; *Earl Brook v. Bulkeley*, 2 Ves. 498; *Taylor v. Stibbert*, 2 Ves. Jur. 437.

(*f*) *Mackreth v. Simmons*, 15 Ves. 329; *Walker v. Preswick*, 2 Ves. 622; *Kator v. Pembroke*, 1 B. C. C. 302.

the recovery of the property. It was *held*, that there had been a concealed fraud within this section. *Sturgis v. Morse*, 2 Beav. 541.

This decision was affirmed on grounds independent of the question of concealed fraud. 3 De G. & J. 1. *Vide* also, as to concealed fraud, *Manby v. Bewicke*, 3 Kay & J. 342.

It is the duty of the Court to investigate thoroughly when a long time has elapsed since the transaction; but if fraud be proven, time has no effect. Transaction was impeached thirty-seven years afterwards. *Charter v. Trevelyan*, 4 L. J., N. S. Chy. 209; 11 Cl. & Fin. 740.

The procuring instruments of conveyance and devise to be executed by a person of unsound mind is a fraud within this section of the Act. *Lewis v. Thomas*, 3 Hare, 26.

As to conveyance by a lunatic, see *Price v. Berrington*, 3 Mac. & G. 486.

As to what constitutes reasonable diligence in the discovery of concealed fraud within this section, see *Chetham v. Hoare*, L. R. 9 Eq. 571; *Vane v. Vane*, 21 W. R. 66.

Time is no bar to fraud. (a)

A Court of Equity will not impeach a transaction on the ground of fraud, where the fact of the alleged fraud has been within the knowledge of the party many years; but *held* that every new right of action in equity which accrued to the party must be acted on to the utmost within twenty years, except in the case of a trustee whose possession was consistent with the title of the claimant. 2 Sch. & Lef. 637.

Where a party is to be constituted trustee by a decree of a Court of Equity, founded on fraud or the like, his possession is adverse, and the Statute of Limitations will run from the time the circumstances of the fraud were discovered. 2 Ball & B. 129; *Brooksbank v. Smith*, 2 Y. & Coll. 58.

(a) 1 Fonbl. 331; *Cotterill v. Purchase*, Forrest. 61; *Alden v. Gregory*, 2 Eden, R. 230; *Whalley v. Whalley*, 1 Mer. 436; *Doleraine v. Brown*, 2 Br. C. C. 633; *Gordon v. Gordon*, 3 Swanst. 400.

33. Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring a suit is not barred by virtue of this Act. C. S. U. C. cap. 88, s. 35.

This section is taken from s. 27, 3 & 4 Will. IV., cap. 27, Imp. Stat.

It gives a statutory authority to the former jurisdiction of the Court of Chancery.

“It is certainly true,” said Sir William Grant, “that no time bars a direct trust; but if it is meant to be asserted that a Court of Equity allows a man to make out a case of *constructive trust* at any distance of time after the facts and circumstances happened out of which it arises, I am not aware there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given on the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a Court of Equity to seek that relief.” (a)

With regard to a bar from public or private inconvenience, *Vide* Lewin on Trusts, 6th Edit., 713, and particularly the case of *Pickering v. Lord Stamford*, 2 Ves. jun. 272.

“It is a principle that whenever a party applies to a Court of Equity, and carries on an unfounded litigation, protracted under circumstances and for a lapse of time which deprive his adversary of his legal rights, a substitute for the legal rights of which the party so prosecuting an unfounded charge has deprived his adversary should be supplied and administered.” (b)

(a) *Bedford v. Wade*, 17 Ves. 97.

(b) *Banning's Limitation of Actions*, 123. *Pulteney v. Warren*, 6 Vesey, 73.

In former times there was a question whether a plaintiff was not barred in law by time during the time proceedings were being taken in equity, but this does not apply to Ontario, particularly since the passage of the Administration of Justice Act, and the partial fusion of law and equity.

Our Statute only allows twenty years in any case. In England although forty years was the statutory period, it was always necessary to trace title for sixty years. How far will it be necessary in Ontario under the present Statute? In *Dann v. Spurrier*, Lord Eldon says: "This Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement, a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw any objection in the way of his enjoyment." (a)

Acquiescence is defined as follows by Lord Cottenham, in *The Duke of Leeds v. Amherst*, 2 Phillips, 123: "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. This is the proper sense of the word acquiescence."

It is evident that acquiescence must presuppose full knowledge of the facts. A *cestui que trust* with no knowledge, or imperfect and partial knowledge, can hardly be said to acquiesce. (b)

The cases in Ontario are few, but they are all founded upon the same principle.

(a) 7 Vesey, 231.

(b) *Marker v. Marker*, 9 Hare, 16; *Cooper v. Green*, 2 De G. F. & J. 58; *Chalmers v. Bradley*, 1 Jac. & W. 59; *Lord Selsey v. Rhoades*, 1 Bli. N. S. 1; *Rudd v. Sewell*, 4 Jur. 882-86; 3 Vesey, 748; 6 Vesey, 632.

PART IV.

REVISED STATUTES OF ONTARIO.

CAP. 108.

PRESCRIPTION IN CASES OF EASEMENTS.

We now come to the important subject of Easements by Prescription. The last treatise on easements, that of Goddard, published in 1877, enters very fully into the definition of what is an easement, and it may be well to refer to it here.

“The earliest definition of the word ‘Easement’ is to be found in an ancient and well-known book, called ‘Termes de la Ley,’ in which it is laid down that ‘an easement is a privilege that one neighbour hath of another, by writing or prescription without profit, as a way or sink through his land, or such like’ (a). To the trustworthy character of this book Bayley, J., bears testimony, describing it as a book of great antiquity and accuracy (b); but it will be seen that the words of this definition are very wide in their signification, and will embrace many rights which are not easements in the strict sense of the word, and to which that term ought not to be applied according to modern decisions. Before, however, proceeding to the consideration of those decisions, it may not be out of place to give a definition which, it is conceived, more accurately describes easements strictly so called, and reduces the meaning of the word to proper limits, as it is understood at the present day. An easement is a privilege, without profit, which the owner of

(a) *Termes de la Ley*, 284.

(b) *Hewlins v. Shippam*, 5 B. & C. 229.

one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former.” (a)

Of easements there are two kinds: those that are created by the act of man, and those given by law. The former are strictly and technically called “easements,” the latter, “natural rights.” “Natural rights are inherent in the land, *ex jure naturæ*, and are secured to the landlord by the common law; for example, the right to secure necessary support for land from the adjacent or subjacent soil, while it is allowed to remain in its natural condition, and the due enjoyment of air, light and water, which, by the provision of nature, flow over the soil of one landowner to that of another, for the common benefit of each.”

Although an easement may be obtained, it is not obtained merely by *writing or prescription* according to the modern decisions. A writing not under seal would only give a license the same that would be acquired by word of mouth. “A right of way or a right of passage for water, where it does not create an interest in the land, is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot) otherwise *than by deed*.”

Words of Bayley, J., in *Hewlins v. Shippam*, 5 B. & C. 229; *Fentiman v. Smith*, 4 East. 107; *Cocker v. Cowper*, 1 C. M. & R. 418: “A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful.” *Per* Vaughan, C. J., in *Thomas v. Sorrell*, Vaughan, 351; *Wood v. Ledbitter*, 13 M. & W. 838; 14 L. J. Ex. 161.

(a) Goddard on Easements, 1, 2.

An easement can only be granted by deed, and if given by parol, may be revoked at any time. *Crysler v. Creighton*, E. T. 2 Vic. In *Regina v. Brewster*, 8 C. P. 208, *held*, that twenty years' user will legitimate an easement affecting private property, but not a nuisance. Draper, J., in his judgment says: "It was secondly urged that the dam had been erected upwards of twenty years. For the purpose of establishing an easement affecting the private property of others, this would be sufficient, generally speaking, but it is not so where the consequences of this Act are *ad com*. In *R. v. Cross*, 2 C. & P. 483, Lord Ellenborough says: "It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance." In *Vooght v. Winch*, 2 B. & Al. 662, the Court expressed a clear opinion "that the obstruction of a navigable river, though continued for twenty years, is no bar to a public right."

But a licensee has power to sue, either in his own name or that of his grantor, any person that hinders him in the enjoyment of his privilege (a). "It has been held that a right to take coal from under the land of another person, is an incorporeal right or a privilege, but a right to take *all* the coal lying under the particular close is a corporeal right and not a privilege, because it is a right to part of the soil." (b)

The tenement in respect of which an easement is enjoyed is called the "Dominant tenement," and the owner of that tenement is called the "Dominant owner;" while the tenement in or over which the right is exercised is called the "Servient tenement," and the owner thereof is called the "Servient owner." This ownership must belong to two different persons, and the same person could not have an

(a) *Whaley v. Laing*, 2 H. & N. 476; 26 L. J. Ex. 327; *per* Bramwell, B., in *Stockport Water Works Co. v. Potter*, 3 H. & C. 300; *Mitcalf v. Westaway*, 34 L. J. C. P. 113.

(b) *Wilkinson v. Proud*, 11 M. & W. 33; *Sanders v. Norwood*, Cro. Eliz. 684; *Doe d. Hanley v. Wood*, 2 B. & Ald. 724.

easement over his own land. Lord Hatherley says, "I take the principle laid down in *Harbidge v. Warwick*, 3 Ex. 552, to be, that in order to obtain an easement over land, you must not be the possessor of it, for you cannot have the land itself and also an easement over it." (a)

The latest case decided in the Ontario Courts is that of *Kerr v. Coghill*, decided by Chancellor Spragge, in June, 1877, and not yet reported. (b)

The plaintiff was solicitor for defendant, and bought the land with metes and bounds; the plaintiff claimed the use of a water closet that was not on the piece of land sold, but on another piece of land adjoining, belonging also to the defendant. The description of the land in the deed did not embrace the water closet. The plaintiff had been tenant of the defendant, and during the time of his tenancy used the water closet. A man named Lyon had also been tenant, and also used the water closet during the time of his tenancy. There was evidence that defendant intended to convey the premises that Lyon occupied, and the learned Chancellor seemed to think that the deed the defendant signed conveyed the use of the water closet, and created an easement in favour of the plaintiff. Decree for plaintiff.

In the judgment the learned Chancellor alluded to the case of *Corley v. Lord Stafford*, 1 De G. & J. 238, as to the duty of solicitors buying property from their clients.

This decision appears to me to be contrary to the authorities, as Coghill owned both lots, and during the time that Lyon occupied it there was no easement properly so called. A landlord may allow his tenant to walk over his land without being willing or intending to grant the land or that privilege to a stranger who buys an adjoining lot. No easement can exist when a person owns the land, so that as

(a) *Ladyman v. Grave*, 6 Chy. Appeals, L. R. 767.

(b) Subsequently reported 25 Grant, 179; in which it appears doubtful whether plaintiff had been tenant. Decision based on the effect of the Statute in Short Forms of Conveyances.

long as Coghill was owner there was no easement. Was an easement created by the deed Coghill signed to Kerr, and did defendant, acting under his own unassisted judgment, understand that he was thus creating an easement?

We think benefit will accrue from the insertion of Mr. Shelford's remarks:

"A profit claimed out of another man's soil must be alleged by way of prescription, and not by way of custom, for a custom to take a profit *in alieno solo* is bad (*Blewitt v. Tregonning*, 3 Ad. & Ell. 575; see 9 C. B., N. S. 682), but an easement, as a right of way *in alieno solo*, may be claimed by custom. *Grimstead v. Marlow*, 4 T. R. 717. The reason why a *profit à prendre* cannot be supported by a custom in an indefinite number of people is, that the subject of the *profit à prendre* would in that case be liable to be entirely destroyed. Per Lord Campbell, C. J., *Race v. Ward*, 4 Ell. & Bl. 705. It was observed by Lord Denman, C. J., 'That it might be collected from the case, *Day v. Savadge*, Hob. 85, 86, that that which is matter of interest, as the taking a profit from the soil, must for its existence have some person in whom it is; and a flux body, which has no entirety or permanence, cannot take that interest, which by the supposition is immemorial and permanent, because, from its nature, it cannot prescribe for anything. Necessity, however, will control this; the case of common of pasture exemplifies both the rule and the exception; in itself it is an interest; it is the taking a profit from the soil; it is properly matter of prescription. If the copyholders of one manor will claim it in the wastes of another, they must, because they can, do so by prescribing in the name of their lord, who in the eye of the law, by reason of his estate, has such a permanence as enables him to prescribe; but if they claim it in *his* wastes, they cannot prescribe in their own names and rights by reason of the want of permanence; nor can they in their lord's name, for he cannot claim common in his own land; they are, therefore, from necessity, allowed

to claim it by custom. But what is the necessity? that growing out of the original contract, when they received permission to cultivate for their own benefit, and on condition of certain services, certain portion of their lord's land. That compact included the right of common on the lord's waste; and the law will not suffer that right to want a legal character, and so be without the means of its legal enforcement, though at the expense of strict legal reasoning. In the same way, the right now in question must have originated in each instance in a virtual contract; the owner has permitted the tinner to enter and work, when he did not work himself or devote his waste exclusively to other purposes by inclosure, on the condition that the tinner shall render to him a certain portion, fixed by custom, of the produce of the mine. Here, as in the instance of a common, the thing is in its nature to be claimed by prescription only; but they who have it, and ought to have it in justice, cannot prescribe for it from necessity; therefore, that the undoubted right may not be defeated, they shall be allowed to claim it by custom.' *Rogers v. Brenton*, 10 Q. B. 60, 62.

“In that case the plaintiff claimed under the following custom which the jury found to exist in fact: any person may enter upon the waste land of another in Cornwall, and mark out by four corner boundaries a certain area; a written description of the plot of land so marked with metes and bounds, and the name of the person for whose use the proceeding is taken, is recorded in an immemorial local court, called the Stannary Court, and proclaimed at three successive courts held at stated intervals; if no objection is successfully made by any other person, the Court awards a writ to the bailiff of the court to deliver possession of the said ‘bounds or tin work’ to the bounder, who thereupon has the exclusive right to search for, dig and take for his own use all tin and tin ore within the described limits, paying to the landowner a certain customary proportion of the ore raised, under the name of toll tin. The right descends to executors, and may be

preserved for an indefinite time, either by actually working and paying toll, or by annually renewing the four boundary marks on a day certain. It was *held*, that the custom to preserve the right by the mere ceremony of an annual renewal, without working, is unreasonable and bad in law, and that the plaintiff (who had ceased to work or pay toll for eighteen years) could not recover in the above action even as against a stranger, and that although the alleged custom involved a claim of profit *in alieno solo*, it would have been a good one, if *bona fide* working had been found to be obligatory under it. *Rogers v. Brenton*, 10 Q. B. 26.

“It was said by Willes, J., ‘This is a right claimed by a custom which is clearly bad. You cannot claim a *profit à prendre* out of another man’s land, though you may claim an easement. All the cases, if any, in which such a custom is held to be good must be taken to have been overruled.’ *Constable v. Nicholson*, 11 W. R. 698; 14 C. B., N. S. 230. And see the remarks of Byles, J., *Att.-Gen. v. Mathias*, 4 K. & J. 591. In an action of trespass for taking stones, sand, &c., from the sea shore, the defendant pleaded a custom in the inhabitants of a township of which he was a member, and also a prescriptive right for the inhabitants and overseers of the highways of that township to take such stones, sand, &c., for the repair of the highways. On demurrer, the Court *held* that such a custom was bad, being a *profit à prendre in alieno solo*, and that the overseers of the highways and the inhabitants of a township, not being a corporation, were not capable of taking by grant, and therefore could not claim such right by prescription. *Constable v. Nicholson*, 11 W. R. 698; 14 C. B., N. S. 230; and see *Pitts v. Kingsbridge Highway Board*, 19 W. R. 884. As to a grant by the Crown to a body which could not claim either by prescription or custom, see *Willingale v. Maitland*, L. R., 3 Eq. 103.

“It is an acknowledged principle that, to give validity to a custom—which has been well described to be a usage which obtains the force of law, and is in truth the binding

law, within a particular district or at a particular place, of the persons and things which it concerns (see *Davy's Reports*, 31, 32 (a)—it must be certain, or capable of being reduced to a certainty, reasonable in itself (see *Tyson v. Smith*, 9 Ad. & Ell. 406, 421), commencing from time immemorial, and continued without interruption, subject, however, to the qualifications introduced by the Stat. 2 & 3 Will. IV. c. 71. It belongs to the judges of the land to determine whether a custom is reasonable or not. There are several cases in the books upon the question, What customs are reasonable and what are not. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for '*consuetudo ex certa causa rationabili usitata privat communem legem*' (Co. Litt. 113 a), as the custom of gavelkind and borough-English, which are directly contrary to the law of descent; or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation. But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement; as a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, and beneficial only to the lord. Year B. Trin. 2 H. 4 fol. 24, B. pl. 20. So a custom that the lord of the manor shall have £3 for every pound breach of any stranger (21 H. 4 (a)); or that the lord of the manor may detain a distress taken upon his demesnes until fine be made for the damage, at the lord's will. Litt. s. 212. A custom is void which sets up a claim to lay coals to an indefinite extent and for an indefinite time on the

lands of other copyholders, whereby their lands may be made practically useless, although they would still be liable to pay their rents, and perform their stipulated services to the lord. *Broadbent v. Wilks*, Willes, 360; 1 Wils. 63; recognized in H. L., *Marquis of Salisbury v. Gladstone*, 9 H. L. C. 692. In all these, and many other instances of similar customs which are to be found in the books, the customs themselves are held to be void, on the ground of their having no reasonable commencement, but as being founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate. *Tyson v. Smith*, 6 Ad. & Ell. 421; 1 P. & Dav. 307; 6 Ad. & Ell. 746.

“In trespass for breaking the plaintiff’s close and digging and carrying away clay, the defendant justified as owner of a brick kiln, and pleaded that all occupiers thereof for thirty years had enjoyed, as of right, &c., a right to dig, take and carry from the close so much clay as was at any time required by him and them for making bricks at the brick kiln, in every year and at all times of the year; it was held unreasonable and bad, as amounting to an indefinite claim to take all the clay out of the close in question. *Clayton v. Corby*, 5 Q. B. 415; see 2 Q. B. 813.

“Customs derogatory from the general right of property must be construed strictly, and above all things, they must be reasonable. *Rogers v. Brenton*, 10 Q. B. 57. It is a general rule that customs are not to be enlarged beyond the usage, because it is the usage and practice that make the law in such cases, and not the reason of the thing. 11 Mod. 160; Fitzgib. 243. A usage for the inhabitants to have common to their houses was held not to extend to a new house. *Owen*, 4. A custom would be bad which required a township, part of a parish, to pay a proportion of a church rate without requiring the inhabitants of the township to be summoned to consider the rate. *Reg. v. Dalby*, 3 Q. B. 602. A custom for the inhabitants of a township to go on a close and take water from a spring was held good. *Race*

v. *Ward*, 4 Ell. & Bl. 702; 3 W. R. 240. The custom to erect booths in the highway during a fair has been held legal. Such custom was in substance for every victualler to enter upon any parts of a certain close within a borough within which there was a fair immemorially held for three weeks, but leaving sufficient part of such close open for use as a public highway, and for the more conveniently carrying on their trade during the fair, to erect booths and keep goods there, until the fair was ended, paying to the owner of the soil a reasonable compensation for the use thereof. *Ellwood v. Bullock*, 6 Q. B. 383. But a custom to erect stalls at Statute Sessions for hiring servants was held to be bad, as it could not have had a legal origin. *Simpson v. Wells*, L. R., 7 Q. B. 214. A custom for all the inhabitants of a village to dance on a particular close at all times of the year at their free will for their recreation has been held good. *Abbott v. Weekly*, 1 Lev. 176; cited 4 Ell. & Bl. 713. See *Warwick v. Queen's College, Oxford*, L. R., 10 Eq. 105. A custom is good for the freemen of a town to hold horse races over certain land every Ascension Day. *Mounsey v. Ismay*, 1 H. & C. 729; 11 W. R. 270. Such a custom cannot be claimed on behalf of all the Queen's subjects, but only on behalf of a limited class of people. *Earl of Coventry v. Willes*, 12 W. R. 127. A custom for the inhabitants of a parish to exercise and train horses at all reasonable times of the year in a place beyond the limits of the parish is bad. *Sowerby v. Coleman*, L. R., 2 Ex. 96.

“Equally in the case of custom as in that of prescription, long enjoyments in order to establish a right must have been as of right, and therefore neither by violence nor by stealth, nor by leave asked from time to time. Therefore, where the owners of an oyster fishery had since the reign of Elizabeth held courts and granted for a reasonable fee licenses to fish to all persons inhabiting certain parishes who had been apprenticed for seven years to a duly licensed fisherman, it was *held* that, as every act of fishing had been

by license, there had been no enjoyment as of right so as to give rise to custom. *Mills v. Mayor of Colchester*, L. R., 2 C. P. 476; 3 C. P. 575. A particular custom as to the appointment of a church-warden was held valid. *Bremner v. Hull*, 14 W. R. 964. As to a claim by custom to visitation fees, see *Shephard v. Payne*, 16 C. B., N. S. 132; and to marriage fees, *Bryant v. Foot*, L. R., 2 Q. B. 161; 3 Q. B. 497, where it was said by Kelly, C. B., ‘The true principle of law applicable to this question is, that where a fee has been received for a great length of time, the right to which could have had a legal origin, it may and ought to be assumed that it was received as of right during the whole period of legal memory, that is, from the reign of Richard I. to the present time, unless the contrary is proved.’ L. R., 3 Q. B. 505. The requisites of a valid custom are stated in Broom’s Commentaries, 12–19, 4th Edit.

“A declaration stated that lands were in the occupation of a tenant of the plaintiff, the reversion belonging to him, and that the defendant wrongfully dug out of the lands large quantities of stone, sand and soil, and carried away the same, and made large holes, excavations and cuttings in and through parts of the lands, and erected mounds and banks of earth and rubbish in and upon other parts of the lands, so as thereby permanently to alter, damage, injure and spoil the surface of the lands. The defendant pleaded that R. was seised in fee of all the mines and quarries of stone under the earth or upon the earth within certain parts of a lordship, and that he and all those whose estate he had and has of and in the mines and quarries within the lordship, from time whereof the memory of man is not to the contrary, have been used and accustomed of right, as often as it might be necessary, for the purpose of effectually getting, winning or working the mines or quarries within the parts of the lordship, to enter into and upon any lands within the said parts, within or under which the mines or quarries were situate, such lands being, or having been, part of the waste of the lordship, and to dig, excavate and cut

into and through the same lands unto the stone of the mines and quarries, and out of the holes and excavations so made to raise, dig and get the stones of the mines and quarries, and carry away the same, doing no more damage than necessary. The plea then stated that R. demised a quarry of stone, situate within and under the lands of the plaintiff, being parcel of the mines and quarries of stone within the lordship, to the defendant from year to year; and the plea justified the acts complained of in the exercise of the right. There were two other pleas under the 2 & 3 Will. IV. cap. 17, alleging an enjoyment of the right by the defendant as occupier of the quarry for forty and twenty years. On demurrer it was *held*, that the pleas were good, for the right was not unreasonable, and might have originated in grant. *Roger v. Taylor*, 1 H. & N. 706; 26 L. J., Ex. 203. The custom was upheld in this case on the ground that it was of the nature of an easement. *Constable v. Nicholson*, 11 W. R. 699, *per* Willes, J.

“In an action for working mines under ground near to a house, so that the house was injured and in danger of falling for want of support, the defendant claimed, as lessee of the manor in which the house was situate and of the mines therein, a prescriptive right to work the mines under any houses parcel of the manor, paying to the occupiers of the surface a reasonable compensation for the use of the surface, but without making compensation on any other account; and the defendant justified under that right. *Held*, that such a prescription was bad as being unreasonable, and that such a right could not exist by custom. *Hilton v. Granville*, 5 Q. B. 701; see C. R. & Phill. 283. ‘There can be no doubt but that, to some extent, the authority of *Hilton v. Lord Granville* has been shaken, inasmuch as a position assumed in the reasoning of the Court, as one of the grounds of its decision, has since been distinctly overruled in *Rowbotham v. Wilson*, (8 H. L. Cas. 348; 30 L. J., Q. B. 965), in which the question presented itself for adjudication;

and it cannot be denied that the decision itself has not met with the universal approval of the profession, and that it may be desirable that the validity of that decision should be brought under the consideration of a court of error. At the same time it is equally clear, that though the reasoning of the Court in *Hilton v. Lord Granville* has been impugned, the decision in that case has not been overruled; and the judgment having been a considered judgment, and standing unreversed, we do not feel ourselves as otherwise than bound by it. We must, therefore, but without expressing any opinion one way or the other as to the propriety of the decision in question, give judgment on the third plea for the plaintiff, leaving the defendants to take the case into error, if they shall be so advised.' *Per* Cockburn, C. J., in *Blackett v. Bradley*, 8 Jur., N. S. 588, 589; 1 B. S. 140: '*Hilton v. Lord Granville* decided against a custom for a mine owner to work his mines so as to let down the surface without paying compensation to the person so injured by his mining operations. . . . Even if *Hilton v. Lord Granville* is an authority that where there is nothing to shew for the right but a customary exercise of it, the custom cannot be supported (which I think is open to question), yet the dictum of Lord Denman in that case, that a grant in specie to the effect of the custom could not be supported, has since been overruled.' *Per* Lord Chelmsford, *Duke of Buccleuch v. Wakefield*, L. R., 4 H. L. 410. A custom as between the owner of the surface and the owner of the mine, entitling the latter to cause a subsidence of the surface, if necessary in working his mines, would be bad and wholly void. *Duke of Buccleuch v. Wakefield*, L. R., 4 Eq. 613.

"The rights of a grantee of minerals depend on the terms of the deed by which they are conveyed. Under a grant of minerals a power to get them is a necessary incident. *Rowbotham v. Wilson*, 8 H. L. Cas. 348; 30 L. J., Q. B. 965. *Prima facie* the owner of the surface of land is entitled to the surface itself and all below it *ex jure naturæ*; and those who claim the property in the minerals below, or any

interest in them, must do so by some grant from or conveyance by him. The rights of the grantee of minerals must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Prima facie* it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. A similar presumption *prima facie* arises, that the owner of the mines is not to injure the soil above by getting them, if it can be avoided. *Rowbotham v. Wilson*, 8 H. L. Cas. 360, *per* Lord Wensleydale.

“A custom of tin bounders as to marking out tin works on waste lands in Cornwall is stated in *Rogers v. Brenton*. 10 Q. B. 26. Tin bounders also claim to be entitled by custom to divert all water within their bounds for the purposes of their mines. *Gaved v. Martyn*, 19 C. B., N. S. 732; 14 W. R. 62. This claim was discussed, and it was held that a presumption should be made that a right to use the water had been acquired by arrangement with the owner of the mine as well as with the bounders. *Ivimey v. Stocker*, L. R., 1 Chy. App. 396.

“In order to make out a prescriptive right, it must be claimed as annexed to land, or as having been created by a grant and enjoyed by a body corporate in continuance from time immemorial, or as a right handed down from ancestor to heir without intermission until the person who claims the present enjoyment. *Constable v. Nicholson*, 14 C. B., N. S. 230; 11 W. R. 699.

“There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected. It does not follow that rights which can be sustained by grant can necessarily be sustained by prescription. The law of Scotland agrees with the law of England in holding that the right to village greens and playgrounds stands upon a principle of original dedication to the use of the public. *Dyce v. Haye*, 1 Macq. H. L. 305.

“ A prescription by immemorial usage can in general only be for incorporeal hereditaments, which may be created by *grant*, such as commons, ways, waifs, estrays, wreck, warren, park, treasure trove, royal fishes, fairs, markets, and the like. Co. Litt. 114 a; 5 Rep. 109 b; 1 Ventr. 387; Bac. Abr. Customs (B); Com. Dig. Prescription (C); *Ibid.* Franchises (A. 1). A prescription to have a free warren in a manor and in the demesnes thereof is good. *Rex v. Talbot*, Cro. Car. 311; Jones, 320. As to franchises, see Cruise’s Dig. tit. xxvii.; 2 Bl. Comm. 37–40. The general rule with regard to prescriptive claims is, that every such claim may be good if by possibility it might have had a legal commencement. 1 T. R. 667. The right to hold a fair or market may be acquired by grant and by prescription. 2 Inst. 220. And where the grantee of a market under letters patent from the Crown, suffered another to erect a market in his neighbourhood, and to use it for the space of twenty-three years without interruption, it was adjudged that such user operated as a bar to an action on the case for a disturbance of his market. *Holcroft v. Heel*, 1 Bos. & P. 400; see 2 Wms. Saund. 174, n.; and *Campbell v. Wilson*, 3 East. 294. The lord of an ancient market may by time have a right to prevent other persons from selling goods in their private houses situated within the limits of his franchise. *Moseley v. Walker*, 7 B. & C. 40; *Mayor of Macclesfield v. Pedley*, 4 B. & Ad. 404. So he may determine in what part of the township the market shall be held, and shift it from place to place, or confine the right of holding it to a particular place. *Curwen v. Salkeld*, 3 East. 538; *De Rutzen v. Lloyd*, 5 Ad. & Ell. 456.

“ Stallage is a payment due to the owner of a market in respect of the exclusive occupation of a portion of the soil. Therefore where a person used a market with a chair and a ‘ped,’ that is, a wooden or wicker basket, four feet long, two feet and a-half wide, and two feet high, with a lid which, being turned back and supported by pieces of wood *not fixed*

in the soil, formed a table on which he exposed his provisions for sale, it was held that he was liable for stallage. *Mayor of Yarmouth v. Groom*, 1 H. & Colt. 102. The word 'toll' in a grant of a market may include stallage. An exemption from stallage for the inhabitants of a town can be only by way of custom, not of grant or prescription. Whether an exemption or discharge from toll, other than stallage, could be claimed by such grant or prescription for inhabitants generally, was questioned. *Lockwood v. Wood*, 6 Q. B. 31; affirmed by Exch. Ch. *Ibid.* 50. The grant of a market does not of itself imply a right in the grantee to prevent persons from selling marketable articles in their private shops within the limits of the franchise on market days. *Macclesfield (Mayor, &c.) v. Chapman*, 12 Mees. & W. 18: 13 L. J., N. S., Exch. 32. Such a right can exist only by immemorial custom. *Ibid.* As to claims to a market toll by prescription, see *Lawrence v. Hitch*, L. R., 2 Q. B. 184; 3 Q. B. 521. The Stat. 10 & 11 Vic. cap. 14, consolidates in one Act the provisions usually contained in Acts for constructing and regulating markets and fairs.

"Toll *traverse*, which is defined to be a sum demanded for passing over the private soil of another (Com. Dig. tit. Toll (A.), or a duty which a man pays for passing over the soil of another in a way not a high street (Vin. Abr. tit. Toll (A.), or for a passage over the private ferry, bridge, &c. of another (1 Sid. 454), may be claimed by prescription by a corporation or an individual, without alleging any consideration, and payment time out of mind is sufficient to support the prescription. 2 Wils. 296. Until the Act 2 & 3 Will. IV. cap. 71, such toll could not have been claimed unless it had been taken time out of mind (Fitzh. tit. Toll, pl. 3), and reserved contemporaneously with the dedication of the way to the public. *Pelham v. Pickersgill*, 1 T. R. 660; see *Lawrence v. Hitch*, L. R., 3 Q. B. 521.

"In order to support a prescription against public right, a consideration must be proved; as where *toll-thorough*, that

is, a toll for passing over the public highway, is claimed. *Mayor and Burgesses of Nottingham v. Lambert*, Willes, 111; *Brett v. Beales*, 10 B. & C. 508. And where the plaintiff claimed toll-thorough, and shewed that the soil and the tolls before the time of legal memory belonged to the same owner, although they had been severed since, it was held that it was to be presumed that the right of passage had been granted to the public in consideration of the toll. *Pelham v. Pickersgill*, 1 T. R. 660. A right of distress is incident to every toll (Bac. Abr. Distress, F. pl. 6), but it cannot be sold, except in the case of turnpike tolls under 3 Geo. IV. cap. 126, s. 39. Tolls may be recovered in *assumpsit*, and no proof is given of anything like a contract by the party against whom the claim is made; and stallage, which is a satisfaction to the owner of the soil for the liberty of placing a stall upon it, may be recovered in the same way without shewing any contract between the owner of the market and the occupier of the stall. *Mayor, &c., of Newport v. Saunders*, 3 B. & Ad. 411. The exemption from toll may also be claimed by prescription or by the king's grant. 4 Inst. 252; 1 H. Bl. 206; 4 T. R. 130; 1 Bos. & Pul. 512; 7 Br. P. C. 126; *Mayor of Truro v. Reynolds*, 8 Bing. 275; *Lord Middleton v. Lambert*, 1 Ad. & Ell. 401; 3 Nev. & M. 841. The citizens or burgesses of a city, borough, &c., may prescribe to be quit of tolls. F. N. B. 226, I.; 1 H. Bl. 206; Com. Dig. Toll (G. 1). As to whether inhabitants of a place may prescribe to be quit of toll, see *Baker v. Brereman*, Cro. Car. 418; recognized 6 Q. B. 63. Port or anchorage tolls may be claimed by prescription. *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266.

“A title to lands and other corporeal substances, of which more certain evidence may be had, cannot be made by prescription, as that a man, and all those whose estate he has, have been seised time out of mind of particular lands. Brooke, Prescription, 122; Vin. Abr. Pres. B. pl. 2; Dr. & St. dial. l. c. 8; Finch, 132: 2 Bl. Comm. 264. The right

to a given substratum of coal lying under a certain close is a right to land, and cannot be claimed by prescription. It is otherwise of a right to take coal in another man's land. *Wilkinson v. Proud*, 11 Mees. & W. 33. See *Stoughton v. Lee*, 1 Taunt. 402. What arises by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands (which are now abolished by 9 & 10 Vic. cap. 62), felons' goods and the like. These not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title. Co. Litt. 114; 2 Bl. Comm. 265. A prescription for a right common to all the subjects of the realm cannot be supported. *Pell v. Towers*, Noy, 20; Br. Abr. Pres. pl. 71. Every man of common right may fish in the sea, or with lawful nets in a navigable river (*Warren v. Matthews*, 6 Mod. 73; Salk. 357), and therefore a prescription for a right of fishing in the sea, as annexed to certain tenements, is bad (*Ward v. Cresswell*, Willes, 265), which is not merely the law of this country, but also of nations (Grot. de Jure Belli et Pacis, b. 2, c. 3, s. 9; Bract. lib. 1, c. 22, s. 6); but a subject may have a several fishery in an arm of the sea by prescription. *Mayor of Oxford v. Richardson*, 4 T. R. 439. And though *prima facie* every subject has a right to take fish found upon the sea-shore between high and low water-mark, such general right may be abridged by the existence of an exclusive right in some individual. *Bagott v. Orr*, 2 Bos. & P. 472.

“One prescription cannot be prescribed against another prescription, for the one is as ancient as the other; as if a man prescribe for a way, light or other easement, another cannot prescribe for liberty to stop it when he pleases. *Aldred's Case*, 9 Rep. 58 b; 2 Mod. 105; Com. Dig. Prescription (F. 4).

“A man cannot prescribe or allege a custom against a Statute, because it is the highest matter of record in law (3

T. R. 271; 11 East. 495), unless the custom or prescription be saved or preserved by another Act. Co. Litt. 115. And Lord Coke makes a difference between Acts in the negative and in the affirmative; for a Statute in the affirmative, without any negative express or implied, does not take away the common law; and likewise between Statutes that are in the negative, for if a Statute in the negative be declarative of the ancient law, a man may prescribe or allege a custom against it, as well as he may against a common law. Hargrave's Co. Litt. 115 a, n. (15).

“An ancient custom may be destroyed by the express provisions of a Statute or by positive language inconsistent with the existence of the custom. *Merchant Taylors' Company v. Truscott*, 11 Ex. 855; *Salter's Company v. Jay*, 3 Q. B. 109.

“By the common law a man might have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. But by the Statute of Limitations (32 Hen. VIII. cap. 2), it is enacted that no person shall make any prescription by the *seisin or possession* of his ancestor or predecessor, unless such seisin or possession had been within three-score years next before such prescription made. 2 Bl. Com. 263, 264. And the remedy for such rights, so far as it depended upon real actions, was further abridged by the abolition of real actions after 31st December, 1834, by the Statute 3 & 4 Will. IV. cap. 26, s. 36. Where a profit of any kind to be taken out of lands has not been taken for a vast number of years, and the lands have been enjoyed without yielding such profit to a third person, the consequence is, that the title to it, whatever its nature, shall be presumed to be discharged. 3 Bligh, 245. But a title gained by prescription or custom is not lost by mere interruption of *possession* for ten or twenty years, unless there be an interruption of the *right*, as by unity of possession of right of

common, and the land charged therewith of an estate equally high and perdurable in both. Co. Litt. 114 b. A unity of possession merely suspends; there must be a unity of ownership to destroy a prescriptive right. *Canham v. Fisk*, 2 Cr. & Jerv. 126. Thus, if a person having a right of common by prescription takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the lease, claim the common again by prescription; for the suspension was only of the enjoyment, not of the right. Co. Litt. 113 b.

“Easements are extinguished by the union of seisin of the dominant and servient tenements in the same person. *James v. Plant*, 4 Ad. & Ell. 749. Easements are sometimes extinguished by statute, *e. g.*, the General Inclosure Act, 41 Geo. III. cap. 109, s. 8. They are extinguished when the purpose for which they were created no longer exists. *National Guaranteed Manure Company v. Donald*, 4 H. & N. 8. A prescriptive right may be lost by the destruction of the subject-matter (4 Rep. 88); but not by an alteration of the quality of the thing to which a prescription is annexed. Hob. 39; 4 Rep. 86 a, 87 a. Alterations in the dominant tenement will sometimes extinguish an easement. *Allan v. Gomme*, 11 Ad. & Ell. 772. The release of an easement may be implied from abandonment or non-user. *Cook v. Mayor of Bath*, L. R., 6 Eq. 177. It was said that a release of a right of way, or of a right of common, will not be presumed by mere non-user for a less period than twenty years, although it is otherwise as to lights. *Moore v. Rawson*, 3 B. & Cr. 339. But ‘it is not so much the duration of the cesser as the nature of the act done by the grantee of the easement or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material.’ *Per Lord Denman, Reg. v. Chorley*, 12 Q. B. 519. See *Crossley v. Lightowler*, L. R., 2 Chy. 482. The right to hold courts for the determination of civil suits, granted by the king’s charter to the steward

and suitors of a court of ancient demesne, was held not to be lost by a non-user of fifty years. *Rex v. The Steward, &c. of Havering*, 5 B. & Ald. 691; *Rex v. The Mayor, &c. of Hastings, Id.* 692, n.

“An ancient grant without date did not necessarily destroy a prescriptive right; for it might be either before time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury. *Addington v. Clode*, 2 Bl. Rep. 989. A plea, that before and at, &c., the defendant, and all his ancestors, whose heir he is, from time whereof the memory of man is not to the contrary, have had, and been used and accustomed to have, and of right ought to have had, and the defendant still of right ought to have for himself and themselves, the sole and several herbage and pasturage of and in divers, to wit, 217 acres, &c., of a certain open field, called, &c., was held to be disproved by shewing a grant to the defendant's ancestor eighty-one years before for a valuable consideration; and such plea is not aided by the Stat. 2 & 3 Will. IV. cap. 71, s. 1, which, if relied on, ought to be pleaded. *Welcome v. Upton*, 5 Mees. & W. 398. See *Reg. v. Westmark*, 2 M. & Rob. 305.

“The doctrine as to the grant of a franchise by the Crown within time of memory being a determination of a prescriptive claim to the same franchise does not appear to be settled. Where a bishop, having free warren by prescription over the demesne and tenemental lands of a manor whereof he was seised *jure ecclesiæ*, accepted a grant from the Crown to himself and his successors of free warren over the demesne lands of all his manors in England: it was *held* that, even admitting the grant to have the effect of extinguishing the prescription as to the demesne lands (which the Court considered to be at least doubtful), it could not affect it over the other lands of the manor. *Earl of Carnarvon v. Villebois*, 13 Mees. & W. 313.

“Formerly a prescription could not run against the king, as no delay in resorting to his remedy would bar his right. The maxim was *nullum tempus occurrit regi*. 2 Inst. 273; 2 Roll. 264, l. 40. Com. Dig. Prescription (F. 1); Broom’s Maxims, pp. 65–68, 5th Edit. Liberties and franchises were excepted in the Statute 9 Geo. III. cap. 16, limiting the claims of the Crown to sixty years. By 32 Geo. III. cap. 58, the Crown is barred in informations for usurping corporate offices or franchises by the lapse of six years. See Bac. Abr., 7th Edit., Prerogative (E. 6), 467, and Stat. 7 Will. IV. & 1 Vic. cap. 78, s. 23; *Reg. v. Harris*, 11 Ad. & Ell. 518. It will be observed that by the Stat. 2 & 3 Will. IV. cap. 71, ss. 1, 2, the Crown is placed upon the same footing with the subjects as to the rights affected by that Act.”

34. No claim which may be lawfully made at the common law by custom, prescription or grant, to any profit or benefit to be taken or enjoyed from or upon any land of our Sovereign Lady the Queen, her heirs or successors, or of any ecclesiastical or lay person or body corporate, except such matters or things as are hereinafter specially provided for, and except rent and services, shall, where such profit or benefit has been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such profit or benefit was first taken or enjoyed at any time prior to such period of thirty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and when such profit or benefit has been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. C. S. U. C. cap. 88, s. 36.

This section is taken from 10 & 11 Vic. cap. 5. This Statute has the following preamble: “Whereas, by the law of Upper Canada the title to matters that have been long enjoyed, is subject in some cases to be defeated by shewing the commencement of such enjoyment, to the great inconvenience of and injury to parties having had such long enjoyment.”

This Act was copied almost verbatim from the Imperial Statute 2 & 3 Will. IV. cap. 71.

That latter Statute has the following preamble: "Whereas the expression 'time immemorial,' or 'time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First; whereby the title to matters that have been long enjoyed is sometimes defeated by shewing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice."

This section is the same with regard to the space of time as the old Statute of 2 & 3 Will. IV. cap. 71, the commissioners probably considering that, with regard to easements, the time of prescriptions should not be shortened.

In Lower Canada (Civil Code, art. 2211), "The Crown may avail itself of prescription. The subject may interrupt such prescription by means of a petition of right, apart from the cases in which the law gives another remedy. Among privileged persons the privilege takes effect in the matter of prescription." *Vide* also, arts. 2212–2214, and 2215, which last is similar to this section, and is as follows: "All arrears of rent, dues, interest and revenues, and all debts and rights belonging to the Crown and declared to be imprescriptible by the preceding articles, are prescribed by *thirty* years. Subsequent purchasers of immovable property charged therewith cannot be liberated by any shorter period." (a)

The Act of 2 & 3 Will. IV. cap. 71, is generally called the Prescription Act, and the origin of this Act arose in a curious way. I cannot do better than quote the words of Martin, B., in the case of *Mounsey v. Ismay*, 3 H. & C. 486; 34 L. J. Ex. 52: "The occasion of the enactment of the Prescription Act is well known. It had been long established that the enjoyment of an easement as of right for

(a) McCord, Civil Code. 1 Fer. C. P. 312; Polk. C. O. t. 14 n. 36.

twenty years was practically conclusive of a right from the reign of Richard I., or, in other words, of a right by prescription, except proof was given of an impossibility of a right from that period; and a very common mode of defeating such a right was proof of a unity of possession since the time of legal memory. To meet this, the grant by lost deed *was invented*, but in progress of time a difficulty arose in requiring a jury to find, upon their oaths, that a deed had been *executed* which every one knew never existed; hence the Prescription Act."

Gale on Easements, p. 159, says: "Although the courts refused, in form, to shorten the time of legal memory by analogy to the later Statutes of Limitations, they obviated the inconvenience which must have arisen, from allowing long enjoyment to be defeated by shewing that it had not had a uniform existence during the whole period required, by introducing a new kind of title by presumption of a grant made and lost in modern times." (a)

And on this ground, although it appeared that a right of way had been extinguished by unity of possession (b), or even by an Act of Parliament (c), it has been held that a title might be obtained by an enjoyment for twenty years. These doctrines are only matters of history, as the present Statute and the Prescription Act has settled the time. The Prescription Act did away, at least in part, with the practice of requiring juries on their oaths to be mere passive instruments in finding facts, in the existence of which the Court itself did not believe." Mr. Starkie, in his Treatise on

(a) The introduction of this doctrine was attempted by a modern civilian. "Landensis," says Martin, p. 82, "alleges that though a prescription is not admissible in support of a discontinuous servitude, usage will raise an inference of an actual grant, the existence of which is to be deduced from the patience of the adversary."

(b) *Heymer v. Summers*, cited in *Read v. Brookman*, 3 T. R. 157, Rule N. P. 74.

(c) *Campbell v. Wilson*, 3 East. 294; *Mayor of Hull v. Horner*, Cowp. 102; *Eldridge v. Knott*, Cowp. 214.

Evidence, 2nd Edition, says: "The effect is indirectly to establish an artificial presumption, which, for want either of inclination or authority, could not be established and applied directly. It seems very difficult to say why such presumptions should not at once have been established as mere presumptions of law, to be applied to the facts by the Courts, without the aid of a jury."

"It must be borne in mind that the first section of this Act includes different subjects from those in the second, which distinguishes between easements and common, or *profit à prendre*, and that a different limitation is established for the first and latter cases. *Bailey v. Appleyard*, 8 Ad. & Ell. 167; *Lawson v. Langley*, 4 Ad. & Ell. 890; *Jones v. Richard*, 5 Ad. & Ell. 413. The right to receive air, light or water, passing across a neighbour's land, may be claimed as an easement, because the property in them remains common; but the right to take '*something out of the soil*' is a *profit à prendre*, and not an easement. *Manning v. Wasdale*, 5 Ad. & Ell. 764; 1 Nev. & P. 172; *Blewitt v. Tregonning*, 3 Ad. & Ell. 554; 5 Nev. & M. 308; *Bailey v. Appleyard*, 3 Nev. & P. 257; 8 Ad. & Ell. 161. Prescriptive rights in gross are not within the scope of the Statute. *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; 14 W. R. 13. This section applies only to *profits à prendre* in the land of another, and has no application to a copyholder's acts on his copyhold tenement. *Hanmer v. Chance*, 34 L. J., Chy. 413; 13 W. R. 556.

"The liberty of fowling has been decided to be a *profit à prendre*. *Davies' Case*, 3 Mod. 246. The liberty to hunt is one species of *aucupium*, and the taking of birds by hawks seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit; it is common of fishing. *Anon.*, Hardr. 407. The liberty of hunting is open to more question, as it does not of itself import the right to the animal when taken; and if it were a license

given to one individual, either on one occasion or for a time, or for his life, it would amount only to a mere personal license of pleasure, to be exercised by the individual licensee. But in the case of a grant by deed—‘of free liberty with servants or otherwise to enter lands and there to hunt, hawk, fish and fowl’—to persons, their heirs and assigns,’ where it is apparent that not merely the particular individual named, but any to whom they or their heirs choose to assign it should exercise the right, it has been considered that an interest, or *profit à prendre*, was intended to be granted. *Per Parke, B., Wickham v. Hawker*, 7 Mees. & W. 78, 79. The property in animals *feræ naturæ*, while they are on the soil, belongs to the owner of the soil, and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling, and so forth, and such a grant is a license of a *profit à prendre*. Substantially it may be reserved by the owner of the fee simple when he alienates, although it is considered that, technically speaking, in such a case it is a re-grant of the right by the alienee of the fee simple to the alienor. *Ewart v. Graham*, 7 H. L. 344, 345, *per Lord Campbell*. A right to cut down and carry away trees growing in a close (*Bailey v. Stevens*, 12 C. B., N. S. 91), and a right to take stones and sand from the seashore (*Constable v. Nicholson*, 14 C. B., N. S. 230), have been held to be *profit à prendre*.

“It is an elementary rule of law that a *profit à prendre* in another’s soil cannot be claimed by custom, for this among other reasons, that a man’s soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons, like the inhabitants of a parish or other district, who could not release the right. The claim of free miners to subvert the soil and carry away the substratum of stone without stint or limit of any kind cannot be supported either on the ground of custom, prescription or lost grant. A claim which is vicious and bad in itself cannot be substantiated by a user, however long. *Per Byles, J., Atty.-*

Gen. v. Matthias, 4 Kay & J. 591; *Constable v. Nicholson*, 14 C. B., N. S. 230; *Johnson v. Barnes*, 37 L. T., N. S. 152. To a declaration for breaking and entering the plaintiff's close and taking his fish, a custom pleaded for all the inhabitants of a parish to angle and catch fish in the *locus in quo* was held to be bad, as this was a *profit à prendre*, and might lead to the destruction of the subject-matter to which the alleged custom applied. *Bland v. Lipscombe*, 4 Ell. & Bl. 713, n. (c). A right, claimed by the inhabitants of a township, to enter upon the land of a private person and take water from a well therein for domestic purposes, is an easement and not a *profit à prendre*, and may therefore properly be claimed by custom. *Race v. Ward*, 4 Ell. & Bl. 702; 24 L. J., Q. B. 153; 1 Jur., N. S. 704. The Court held an alleged custom to be bad for all the inhabitants occupying lands in a district to enter a close and take therefrom reasonable quantities of sand, which had drifted thereupon, for the purpose of manuring their lands. The reason was, that the drifted sand had become part of the soil, so that the claim was to take a profit *in alieno solo*. *Blewitt v. Tregonning*, 3 Ad. & Ell. 554, cited in *Race v. Ward*, 4 Ell. & Bl. 712.

“ Before the passing of this Act, a prescriptive claim was a claim of immemorial right; the evidence in support of it was such as a party might be able to give in such a case; and the jury were to draw their inference from such proof as could be produced. Now the burden of establishing an immemorial right is withdrawn, and the proof is limited to thirty years. But the party prescribing must prove his right for that whole period, and no presumption will be drawn from evidence as to part of that period. See 8 Ad. & Ell. 167. The plaintiff prescribed under this Statute, first, for a right of pasture thirty years next before the commencement of the action; and secondly, for a right of simply turning on cattle for twenty years. No evidence was given of acts of depasturing at a period commencing

more than thirty years before the commencement of the suit; but that more than twenty-eight years before the suit (in 1809) a rail was erected, so as to prevent the enjoyment of pasture, and that afterwards, the rail having been removed, the plaintiff depastured for twenty-eight years; it was held, that the defendant was not bound to prove that the rail was erected adversely to the plaintiff's right, but that the *onus* lay on the plaintiff to prove affirmatively his actual enjoyment of pasture for thirty years, and that no presumption could be admitted in his favour on proof of enjoyment for a less period. *Bailey v. Appleyard*, 8 Ad. & Ell. 161, and note explanatory of case; 3 Nev. & Per. 257, note on case; 2 P. & Dav. 1; 2 Jurist, 872. It was also held, that proof of his enjoyment of pasture for twenty-eight years did not include proof of the right of turning on for twenty years, the latter right being an easement only, a right of a quite different nature, and of which no evidence was given. *Ibid*.

“The plaintiff claimed a right of common by prescription in respect of a *que* estate in land, and also by thirty and sixty years' enjoyment by the occupier of the land. The defendant offered evidence that a tenant then deceased, while tenant of the land for years, had declared that he had no such right in respect of the land: it was held, that the declaration was not admissible, inasmuch as it was in derogation of the title of the reversioner. *Papendick v. Bridgwater*, 5 El. & Bl. 166; 1 Jur., N. S. 657; 24 L. J., Q. B. 289. Lord Campbell, C. J., observed: ‘It would be very mischievous if it were in the power of a tenant to destroy a *profit à prendre* belonging to the land which he occupies, or to impose a servitude upon it. There is no difference in this respect between destroying an easement and creating one. If the tenant might say that the land enjoyed no right of way, he might also say that it was liable to an easement for taking water, *profit à prendre* by turbary or other common. It would come to this: that by

the tenant's acknowledgment of a servitude, like that in *Scholes v. Chadwick*, 2 Moo. & R. 507, or for cutting turf or taking away sand, the tenant might create a servitude against the reversioner. That would be very inconvenient, and it is upon the view of the balance of general convenience that the English laws of evidence are founded. In *Daniel v. North*, 11 East. 372, it was decided that the acquiescence of the tenant cannot prejudice the landlord, and if so, I think, *à fortiori*, that his declaration cannot.' *Papendick v. Bridgwater*, 5 Ell. & Bl. 177; see *Scholes v. Chadwick*, 2 Moo. & R. 507; *Reg. v. Bliss*, 7 Ad. & E. 550.

“The turning of cattle upon alluvium by the proprietor of land not separated from it by any boundary, although without interruption, was held not to be an assertion of right so acquiesced in as to raise a presumption of title. Lord Chelmsford, L. C., observed: ‘The effect of acts of ownership must depend partly upon the nature of the property upon which they are exercised. If cattle be turned upon inclosed pasture ground, and be placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected from intrusion, and if it could it would not be worth the trouble of preventing it, there mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition.’ *Atty.-Gen. v. Chambers*, 4 De G. & J. 55; see pp. 65, 66. See *In Re Hainault Forest Act*, 1858, 9 C. B., N. S. 648.

“This section of the Act does not prevent a claim to a right of common, &c., from being defeated after thirty years' enjoyment, by shewing that such right was first enjoyed at a time when it could not have originated legally. A claim to a right of common over a crown forest, in respect of a certain tenement being vested on thirty years' uninterrupted

enjoyment under this section, may be defeated by shewing that the tenement has been inclosed from the waste of a manor only forty years, and that the grant of any right over the forest was made absolutely void by a Statute passed previously to the inclosure. It was questioned whether this Act has any application to the case in which the establishment of a right by means of this Statute would be a violation of the express terms of Statutes prohibiting the granting of such a right. *Mill v. New Forest Commissioners*, 18 C. B. 60; 2 Jur., N. S. 520; 25 L. J., C. P. 212.

“In replevin for taking the plaintiff’s cattle, to an avowry damage feasant the plaintiff pleaded in bar under this Statute a user for thirty years as of right, and also for sixty years as of right of common of pasture over the *locus in quo*. At the trial the fact of user by the plaintiff and by other occupiers of his farm was proved; but it appeared that S., from whom the plaintiff and the defendant derived their title, was for more than sixty years before and until within thirty years seised in fee of the plaintiff’s farm, and during the same period had an estate for life in the land over which the right of common was claimed, but never had actual possession of the dominant tenement, except by the tenant. More than thirty years before action, he joined with a remainder-man in making a conveyance of the servient tenement for making a tenant to the *præcipe* for the purpose of suffering a recovery, in order to raise money on mortgage; but no recovery was suffered, and S. continued possessed until twenty-eight years before the action, when the property was sold, and all community of title had ceased; it was held that, although there was no unity of seisin to extinguish an easement or to prevent its existence, the facts precluded an enjoyment as of right within the meaning of this Act. The title to the tenements was such that there could not, in point of law, have been an enjoyment of the right of common for the period of sixty years as of right, for S. being owner in fee of the farm, and also

tenant for life and occupier of the common, the rights of the tenants over the common were derived from him, and as he could not have an enjoyment as of right against himself within the meaning of the Statute, so neither could his tenants. *Warburton v. Parke*, 2 H. & N. 64; 26 L. J., Ex. 298.

“Where there had been actual and uninterrupted enjoyment of a right to cut turf for sixty years, but the enjoyment appeared to be referable during the whole period to an agreement in writing made by a tenant for life of the servient tenement, and acquiesced in and acted on by the successive owners of that tenement, it was held that although the tenant for life who made the agreement and the next succeeding tenant in tail had both died before the sixty years began to run, no prescriptive right had been gained under this section. *Lowry v. Crothers*, I. R., 5 C. L. 98.

“The 1st section requires in the case of a right of common or a *profit à prendre*, enjoyment ‘without interruption for the full period of thirty years;’ the most undoubted exercise of enjoyment for twenty-nine years and three-quarters will not be sufficient. *Bailey v. Appleyard*, 8 Ad. & Ell. 164; see *Flight v. Thomas*, 11 Ad. & Ell. 688. Taking the first, fourth and fifth sections together, it has been decided that the period mentioned in the Act is thirty years next before some suit or action in which the claim shall be brought into question, and that an allegation of an enjoyment for thirty years next before the times when the trespasses to which the plea relates were committed is insufficient. *Richards v. Fry*, 3 Nev. & P. 67; 7 Ad. & Ell. 698; *Wright v. Williams*, 1 Mees. & W. 77.

“If the Statute be relied on it ought to be pleaded. *Welcome v. Upton*, 6 M. & W. 401. Plea of enjoyment of a right of common for thirty years before the commencement of the suit was held sufficient, without saying thirty years next before. *Jones v. Price*, 3 Bing. N. C. 52. The proper

mode of pleading a profit to be taken out of land is the enjoyment of the right for the periods mentioned in the first section. *Welcome v. Upton*, 5 Mees. & W. 398; 7 Dowl. P. C. 475." (a)

35. No claim which may lawfully be made at the common law by *custom*, prescription or grant, to any way or *other easement*, or to any water-course, or the use of any water to be enjoyed, or derived upon, over, or from any land or water of our said Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person or body corporate, when such way or other matter as herein last before mentioned, has been actually enjoyed by any person *claiming right thereto* without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to the period of twenty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned has been so enjoyed, as aforesaid, for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. C. S. U. C. cap. 88, s. 37.

This section is taken from 10 & 11 Vic. cap. 5, s. 2, which was taken from 2 & 3 Will. IV. cap. 71 (Imp. Act), s. 2.

The leading case in the Canadian Reports on this section is *Bowlby v. Woodley*, 8 Q. B. 318. Chief Justice Robinson delivered the judgment of the Court. Draper, J., was with him except with regard to the pleadings, and Burns, J., concurring with the Chief Justice, the defendant succeeded.

In this case, defendant had used a mill dam for more than twenty years while it belonged to the Crown, and *after the survey*, as in the eighth section of 10 & 11 Vic. cap. 5, is necessary, and which is the 42nd section of this Act.

The learned Chief Justice Robinson held that the Statute fully granted the easement. All easements, even by prescription, are supposed to be granted either expressly or impliedly.

(a) Shelford's Real Property Statutes, pp. 2-5.

The question of the retrospective effect of the Act was also taken into consideration, and decided on the general principle mentioned in the remarks of Bayley, J., *supra*.

In delivering the judgment of the Court, the learned Chief Justice uses the following words: "I consider that the right or privilege used by the defendant of backing water on the land, is an easement coming within the second clause of our Statute, because it is an easement to which a title may be acquired by custom, prescription or *grant*, and certainly as against the Crown by grant as against an individual; that the evidence, shewing an uninterrupted enjoyment for twenty years next before this action brought, without any permission obtained or asked, and enjoyed openly, not covertly or by stealth, as the fact must have been from the very nature of the easement itself, we are to take it that the defendant enjoying it and *claiming right thereto*, that this case being made on the one side and nothing shewn to rebut it on the other, the Statute leaves nothing necessary to be found by the jury, but establishes the right as a legal consequence." (a)

Draper, J., refers, in support of his technical objection, to *Pye v. Mumford*, 12 Jur. 579; *Clayton v. Corby*, 2 Q. B. 813 (Eng. Rep.) See also the case of *Stuart v. Spence*, 10 Q. B. 486, more especially referred to subsequently.

The Prescription Act, although it has given some increased facilities to a party claiming an easement, has not superseded the common law, but allowed him an election either to proceed under the Statute, or according to the common law, or both.

Nor is the title by lost grant put an end to any more than the title by prescription is abrogated by it; indeed, so far as the preamble may be permitted to afford an indication

(a) Cases cited: 5 Tyr. 85; 11 Ea. R. 374; 5 B. & C. 232; 8 East. 309; 4 B. & Al. 580. Gale on Easements, 6, 108; 1 C. M. & R. 217.

of the objects of the Statute, it would seem that the principal motive for passing the Statute was in order to obviate the difficulty which arose from shewing the actual commencement of an enjoyment within the time of legal memory.

“The Statute only applies where you want to stand upon thirty years’ user; but here, where the title is one of 200 or 300 years, that Statute is not needed, and the title can be vested on the original right before the passing of the Statute.” *Warwick v. Queen’s College, Oxford*, L. R. 6 Chy. 738. In *Ladyman v. Grave*, 6 Chy. 764, n., Stuart, V. C., *held*, that the Statute did not apply to ancient rights which had become ancient rights by prescription anterior to the passing of the Statute. In *Aynesley v. Glover*, L. R. 10, Chy. 283, the plaintiff, whose windows had existed before 1808, was held to have a title independently of the Statute, Mellish, J., saying, “The Statute has not taken away any of the modes of claiming easements which existed before the Statute. Indeed, as it requires the twenty years (the enjoyment during which confers a right) to be the twenty years or forty years next immediately before some suit or action is brought with respect to the easement, there would be a variety of valuable easements which would be altogether destroyed if a plaintiff was not entitled to resort to the proof which he could have resorted to before the Act passed.”

In this section, the words “No claim which may lawfully be made at the common law by *custom*, *prescription*, or *grant*,” are to be noticed.

There is a great deal of difference between custom and an easement. This was fully discussed in the case of *Mounsey v. Ismay*, 3 H. & C. 486. The head note to this case is as follows: “A claim by custom for the freemen and citizens of a town on a particular day in the year, to enter upon a close for the purpose of holding horse races thereon, is not a claim to an ‘easement’ within the 2nd section of the Prescription Act, 2 & 3 Will. IV. cap. 71. That section

points to an individual in respect of his land, not to a class, such as freemen or citizens claiming a right in gross, wholly irrespective of land; and to bring the right within the term 'easement' in that section, it must be one analogous to that of a right of way or a right of watercourse, and must be a right of utility and benefit, and not one of mere recreation and amusement. *Semble*, That an easement in gross is within the Prescription Act." (a)

Martin, B., in delivering the judgment of the court, says: "The question which has been argued before us, and which is the true one, is whether a custom for the freemen or citizens of Carlisle, upon Ascension Day, to enter upon another man's land, for the purpose of holding horse races there, is an easement within the second section. To be so it must be within the words *custom*, prescription or grant, to a way or *other easement*, or to a water-course, or to the use of any water to be enjoyed upon land of another, and we think it is not. In the first place, we do not think that this custom is an easement at all. One of the earliest definitions of an easement with which we are acquainted is in the *Termes de la Ley* (*vide infra*, page 161). In this definition, *custom* is not mentioned, prescription is, and it therefore seems to point to a privilege belonging to an individual, not a custom which appertains to many as a class. We are of opinion that to bring the right within the term easement in the second section, it must be one analogous to that of a right of way which precedes it, and a right of water-course which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement. In our opinion, therefore, the present alleged right is not within the language or meaning of the Prescription Act, and we are satisfied that it was never in the contemplation of Lord Tenterden, who framed it (*per* Lord Wensleydale, 5 M. & W. 404), to include within the Act such customary rights

(a) *Bailey v. Stephens*, 12 C. B., N. S. 91, 113; *Bland v. Lipscombe*, 4 Ell. & Bl. 713, n. (c); *Dyer v. Lady James Hay*, 1 Macq. 305.

as entering land to enjoy rural sports, as in *Millechamp v. Johnson* (a), or to dance upon a green, as in *Abbott v. Weekly* (b), by analogy to which we held this customary right to run horse races a lawful one at common law. What we think he contemplated was incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment, and not customs for mere pleasure."

But "although it has been laid down thus broadly that a custom and an easement are totally different rights, there undoubtedly can be a custom in a locality under and by virtue of which an individual may become entitled to an easement in respect of his estate situated in the locality to which the custom belongs" (c). Such is the case with regard to the customs in the county of Cornwall, with regard to the tin mines. (d)

The law will not recognize any new species of easements, for "a new species of incorporeal hereditament cannot be created at the will and pleasure of an individual owner of an estate. He must be contented to take the sort of estate, and the right to dispose of it, as he finds the law settled by decisions or controlled by Act of Parliament." *Per* Pollock, J., C. B., in *Hill v. Tupper*, 32 L. J. Ex. 217.

The words of Lord Brougham in the case of *Keppel v. Bailey*, 2 Mylne & K.: "It must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing the fullest latitude to men, in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a

(a) Willes, 205, note b; 1 Lev. 176.

(b) 5 M. & W. 398.

(c) Goddard on Easements, 19.

(d) *Carlyon v. Lovering*, 1 H. & N. 784; 26 L. J. Ex. 251; *Gaved v. Martyn*, 34 L. J. C. P. 354; *Ivimey v. Stocker*, L. R. 1 Chy. App. 396.

reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote. Every close, every messuage must then be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his property with other obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations upon the premises, besides many other restraints as infinite in variety as the imagination can conceive; for there can be no reason whatever in support of the covenant in question, which would not extend to every covenant that can be devised." (a)

The cases cited in *Keppel v. Bailey*, which apply to this subject, are the following: *Spencer's Case*, 5 Rep. 16 a; *Bally v. Wells*, Godb. 120; s. c. Moore, 243; *Mayor of Congleton v. Pattison*, 10 East. 130; *Collins v. Plumb*, 16 Ves. 454; *Canham v. Rust*, 8 Taunt, 227; *Hartley v. Pehall*, 1 Peake, N. P. C. 131; *The Duke of Bedford v. Trustees of British Museum*, 2 Mylne & K. 552; *Vyvyan v. Arthur*, 1 B. & Cress. 410; *Uxbridge v. Staveland*, 1 Ves. sen. 56; *Case of the Manchester Mills*, 1 Douglass, 222; *Holmes v. Buckley*, P. Ch. 39; *Brewer v. Hill*, 2 Anst. 413; *Jourdain v. Wilson*, 4 B. & Ald. 266; *Vernon v. Smith*, 5 B. & Ald. 1; *Sampson v. Easterby*, 9 B. & Cress, 505; *Barclay v. Raine*, 1 S. & S. 449; *Tupper v. Hill*, 2 H. & C. 121; 32 L. J. Ex. 217.

(a) Case that has followed this judgment: *Ackroyd v. Smith*, 10 C. B. 164; 19 L. J. C. P. 315.

Although any burden of a new species which the owner thinks proper to impose on his land is not an easement which can be made appurtenant to land, yet such an obligation is perfectly valid as between the grantor and grantee of the right; and if the grantee is disturbed in his enjoyment by the grantor, the law will afford him ample remedy by action on covenant for the injury.

In the case of *Leech v. Schweder*, L. R. 9 Chy. App. 475, Mellish, L. J., says: "Where there is such a covenant that a person shall have an uninterrupted view from his drawing-room window, because the law will not allow the owner of land to attach an unusual and unknown covenant to the land, so that a man who buys the property in the market without knowing that it is subject to any such burden, would find that some previous owner professed to bind all subsequent owners by an obligation not to obstruct the view which somebody else would have from the windows of his house. In such a case as that, though the man who makes the covenant is liable, yet those claiming under him are not liable at law; but the Court of Equity says, that if a purchaser has taken the land with notice of that contract, it is contrary to equity that he should take advantage of that rule of law to violate the covenant. But in the case of a grant of a well known easement, such as a right to light, or a water-course, or a right of way, or any of the numerous easements which are well known to the law, when they are once validly created, the right passes at law, and the owner and occupier of the dominant tenement may maintain an action against the occupier of the servient tenement if the right is interfered with; and in all such cases the rule in equity ought to follow the law."

Sir William R. James, L. J., says: "I think, further, that the right to lights means the very same thing as is expressed in the Prescription Act 2 & 3 Will. IV. cap. 71, s. 3, by the words 'access and use of light to and for any dwelling-house, workshop, or other building.'" 9 Chy. App. L. R. 478.

“The following rights appear to have been treated as easements: A right to fasten clothes lines and dry linen (*Drewell v. Towler*, 3 B. & Ad. 735); a right to nail trees to a wall (*Hawkins v. Wallis*, 2 Wills. K. B. 173); a right to use another’s chimney for conveyance of smoke (*Henry v. Smith*, 22 Beav. 299; 1 Kay & J. 389; also in Ontario courts, *Culverwell v. Lockington*, 24 C. P. 611); a right to have a public house sign-post on a common opposite the house (*Hoare v. The Metropolitan Board of Works*, L. R. 9 Q. B. 296); a right of eaves dropping on to a neighbour’s land (*Harvey v. Waters*, L. R. 8 Chy. App. 162); a right to tether horses (*Johnson v. Thoroughgood*, Hob. 64). The latter right may have been a species of right of common, for obtaining pasturage was the object of the privilege.”

As to the nature of the extent of the enjoyment of an easement, a good case remains in the Ontario courts in *Heward v. Jackson*, 21 Grant, 263.

V. C. Blake there says: “I think a reasonable rule to lay down would be that the nature of the enjoyment had at the time of the grant of the easement should be the measure of the enjoyment during the continuance of the grant—that the grant must be taken to give unfettered the right of way which existed at its date. Here, when the plaintiff purchased, there was no bar to the uninterrupted use of this lane; and I am of opinion that the erection of the gate in question is a nuisance, as it interrupts the free and open passage which before was enjoyed, and to which the plaintiff was entitled. In *James v. Hayward*, 16 Sir W. Jones’ Rep. 221, Sir William Jones says: ‘If a private man hath a way over the land of J. S. by prescriptive grant, J. S. cannot make a gate across the way;’ and although Croke, J., in that case says, ‘the law accounts not such petty troubles nuisances,’ yet Mr. Gale, at page 578, and Mr. Angell, at section 223, approve of the view taken by Sir William Jones. Here it is shewn that there were cattle continually in the lane, to protect herself from which the

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plaintiff was obliged to place a gate at the entrance to her premises. The erection now insisted on by the defendant causes a second interruption, which, although not perhaps of much moment when walking, is a substantial discomfort when driving, and one to which I do not think the defendant can compel the plaintiff to submit."

Cases cited in this case: *Ackroyd v. Smith*, 10 C. B. 164; *Skull v. Glenister*, 16 C. B., N. S. 81; *Hutton v. Hamboro*, 2 F. & F. 218; *Wood v. Sutcliffe*, 21 L. J. Chy. 253; *Philips v. Treeby*, 8 Jur. N. S. 711; *Watts v. Kelson*, L. R. 6 Chy. 166; *Hawkins v. Carbines*, 27 L. J. Ex. 44; *Fielder v. Bannister*, 8 Grant, 257; *Kidgill v. Moore*, 9 C. B. 364.

Not only will the Court of Chancery uphold by decree the infringement of the rights of a party to an easement where there has been a grant, but also where there has been only an agreement for a grant, and an agreement for an easement is presumed *prima facie* to be for an easement in perpetuity. A legal title to a private right of way can be obtained only by prescription or user for the time required by the Statute to give a title to easements or by grant; but equity entertains jurisdiction to enforce agreements for easements as it would for the purchase of the fee. The owners of two adjoining half lots entered into a parol agreement for a lane between the two half lots, the agreement not being limited in terms as to time; each accordingly erected his fence so as to leave about a rod of his land for his part of the lane, and the respective proprietors used the lane in common for fifteen years, until after the death of one of the original parties to the agreement. The deceased laid out his farm and planted his orchard with reference to the lane. *Held*, that the agreement must be presumed to have been for a lane in perpetuity. Proudfoot, V. C., in delivering the judgment of the Court, says: "There can be no dedication, properly speaking, to private uses. A private way cannot be created by dedication. The very evidence which would tend to shew dedication would disprove it as

a private way (a). An agreement to grant an easement is good in equity, and will be enforced (b). In *The Duke of Devonshire v. Elgin*, 14 Beav., the defendant had consented to plaintiff making a water-course through his land upon being paid a proper and reasonable sum. The water-course was made but no grant was executed, and no sum arranged. After nine years' user the defendant stopped it up, but he was restrained by perpetual injunction from interfering with it, and a reference was made to the Master to fix a proper compensation. *Craig v. Craig*, 24 Grant, 573. See also *Powell v. Thomas*, 6 Hare, 300; *Laird v. Birkenhead Railway Co.*, Joh. 500; *Duke of Beaufort v. Patrick*, 17 Beav. 60; *Bankart v. Houghton*, 27 Beav. 425; *Somerset Coal Co. v. Harcourt*, 24 Beav. 571; *Morland v. Richardson*, 22 Beav. 596."

The cases with regard to *air*, and how far it may be polluted in the way of business, are not numerous in Ontario, as our cities have not as yet become so crowded, and our manufactories not as yet so numerous as in the mother country. Still the reader is referred to *Radenhurst v. Coate*, 6 Grant, 139; and *Cartwright v. Gray*, 12 Chy. 399.

In the former case, *held*: "It is a plain, common law right to have the free use of the air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty years will not bar that right. To bar the right within a stated period there must be such encouragement, or other act by the party afterwards complaining, as to make it a fraud in him to object." This was a suit brought against a soap manufacturer in the city of Toronto, praying for an injunction. It was decreed on motion for decree, although an interlocutory injunction was refused.

(a) *Craig v. Craig*, 24 Grant, 573; *Commonwealth v. Newberry*, 2 P. & M. 57; *M. E. Church v. Hoboken*, 33 New Jersey, 13.

(b) *East India Co. v. Vincent*, 2 Atk. 83; *Philips v. Treeby*, 3 Giff. 632.

In the latter case, an owner of a planing mill was accustomed to burn the shavings in such a way that the smoke annoyed the plaintiff. An injunction was obtained also.

Mowat, V. C., in delivering the judgment of the Court, says: "These and other authorities shew that while the plaintiffs cannot insist upon the complete immunity from all interference which they might have in the country, the defendant cannot on that ground justify throwing into the air, in and around the plaintiff's houses, any impurity which there are known means of guarding against."

The argument and judgment in the case of *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608; 1 L. R. App. 66; 11 Jur. N. S. 785, is well worthy of perusal. *Vide* also, *The Stockport Water-works v. Potter*, 7 H. N. 160; *Bamford v. Turnley*, 3 B. & S. 62; 9 Jur. 377.

POLLUTION OF AIR.

We have before mentioned the cases that have arisen in this country on the point. Many of them have the English cases cited, but we will add the following: *Tipping v. St. Helen's Smelting Co.*, 11 H. L. C. 650; 35 L. J. 2 Bat. 72; *Aldred's Case*, 9 Coke, 58; *Walter v. Selfe*, 4 De G. & S. 315; *Beardmore v. Tredwell*, 3 Giff. 683; *Crumph v. Lambert*, L. R. 3 Eq. 409; *Morley v. Pragnall*, Cro. Car. 510.

In the case of *Bliss v. Hall*, 4 Bing. N. C. 183, which was an action for polluting the air by melting tallow, defence was that defendant possessed his factory three years before the plaintiff possessed his house. *Held*, on demurrer, that the matters alleged for the defence formed no answer to the declaration, for that the plaintiff came to the house he occupied with all the rights the common law affords, and that one of them was the right to wholesome air; so that, unless the defendant could shew a prescriptive right to pollute the air which was accustomed to flow to the plaintiff's house, the plaintiff was entitled to judgment. *Vide* also *Tipping v. St. Helen's Smelting Co.*, L. R. 1 Chy. App. 67.

Hole v. Barlow, 4 C. B., N. S. 334, was the first of a series of cases which have been determined as to how far a man might exercise a lawful trade, though it did produce some inconvenience and unpleasantness to others. The action was for a nuisance created by brick-making. Byles, J., said: "He apprehended the law to be that no action lies for the reasonable use of a lawful trade in a *convenient* and *proper place*;" and he directed the jury that it was a convenient and proper place. Verdict for defendant. Rule *nisi* discharged afterwards. See also *The Stockport Waterworks Co. v. Potter*, 4 C. B., N. S. 334, and *Jones v. Powell*, Holt, 135, 136; s. c. Palm. 536.

Hole v. Barlow was overruled by *Bamford v. Turnley*, 3 B. & S. 66, 31 L. J. Q. B. 286. See also *Cavey v. Led-bitter*, 13 C. B., N. S. 470.

The case of *Bamford v. Turnley* was also for damages caused by defendant burning bricks some 180 yards from plaintiff's house. "The meaning of the word 'convenient,' as it was used by several authorities, was considered by the majority of the judges giving the decision, and the judgment says that it seemed that just as the use of an offensive trade will be indictable as a public nuisance if it be carried on in an *inconvenient* place, *i. e.* a place where it greatly incommodes a multitude of persons, so it will be actionable as a private nuisance if it be carried on in an inconvenient place, *i. e.* a place where it greatly incommodes an individual."

The case of *Bamford v. Turnley* went up to appeal, and the head note of the case is as follows: "An action lies for a nuisance to the house and land of a person whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the act complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, and this whatever the locality may be where the act complained of is done; and when, on the trial of such an action, it appears that the act complained of was done on the land

of the defendant, the jury cannot properly be asked whether the causing of the nuisance was a reasonable use by the defendant of his own land; *per* Erle, C. J., Williams and Keating, JJ., Bramwell and Wilde, BB., reversing the decision of the Queen's Bench; Pollock, C. B., *dissentiente*."

In *Wanstead Local Board of Health v. Hill*, 4 C. B., N. S. 334, it was decided that, under the words of a particular Statute, brick-making was not a noxious or offensive business. Mr. Justice Willes there says: "It is still an open question to be determined by the highest tribunal, whether one who carries on a business under reasonable circumstances of place, time and otherwise, can be said to be guilty of an actual nuisance." Accordingly, when the case of *Tipping v. St. Helen's Smelting Co.* was decided, it was appealed to the House of Lords, and this was their decision: "There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter, a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place and the trades carried on around him; as to the former, the same rule would not apply."

Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages in respect of injury created by it to property in the neighbourhood.

A place where the works of one person are carried on which occasion an *actionable injury* to the property of another, is not within the meaning of the law a "*convenient place*."

Goddard (page 296) says: "Unless a person carrying on a trade has acquired as an easement a right to pollute the air to such an extent and in such a manner as to produce material injury to health or property, such pollution is in

every case an actionable injury, and it is no justification for causing such injury to charge that it was caused by the exercise of a trade which was carried on in a convenient and proper place, and was a reasonable use by the defendant of his own land (a). If, on the other hand, mere personal discomfort is produced, those facts may justify the injury produced, but *each case* must depend upon its own circumstances, for every man has a right that the air shall not be polluted to such an extent and in such a manner as to interfere materially with the ordinary comfort of human existence; yet a man must not be fastidious, for the law will not allow him to sue for trifling or temporary annoyances, and the locality in which he dwells must be taken into consideration, in determining whether he has a right of action.” (b)

The case of *Benjamin v. Storr*, decided in 1874, is worthy of consideration. The action was brought by the keeper of a coffee-house against an auctioneer who had occasion to use a great many vans and horses. These vans and horses obstructed the light of the plaintiff, and the horses made so much dirt that the trade of his coffee-house was materially diminished. Brett, J., says: “There are three things which the plaintiff must substantiate beyond the existence of the mere public nuisance before he can be entitled to recover. In the first place, he must shew a *particular injury* to himself beyond that which is suffered by the rest of the public. It is not enough for him to shew that he suffers the same inconvenience in the use of the highway as other people do, if the alleged nuisance be the obstruction of a highway. The case of *Hubert v. Groves*, 1 Esp. 148, seems to me to

(a) In *Cooke v. Forbes*, L. R. 5 Eq. 166, 37 L. J. Chy. 178, it was held, that if a person manufactures goods, although of a particularly sensitive or delicate character, it is a wrongful act for another person to allow noxious fumes to be emitted from his manufactory, if the goods of the former are thereby damaged.

(b) *Swaine v. Great Northern Railway Co.*, 33 L. J. Chy. 399; *St. Helen's Smelting Co. v. Tipping*, per Lord Westbury, C., 11 H. L. C. 642. See, however, *Benjamin v. Storr*, L. R. 9 C. P. 400.

prove that proposition. There the plaintiff's business was injured by the obstruction of a highway, but no greater injury resulted to him therefrom than to any one else, and therefore it was held that the action would not lie." See also *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316.

Other cases shew that the injury must be direct, and not a mere consequential injury; as, where one way is obstructed but another (though possibly a less convenient one) is left open: in such a case, the private and particular injury has been held not to be sufficiently direct to give a cause of action. Further, the injury must be shewn to be of a substantial character, not fleeting or evanescent. If these propositions be correct, in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be *particular, direct and substantial*."

There is no right of reversioner to sue for pollution of air. *Simpson v. Savage*, 1 C. B., N. S. 347.

Acquiescence. *Bankart v. Houghton*, 27 Beav. 425; 28 L. J. Chy. 473.

The argument and judgment in the case of *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608, is well worthy of perusal.

Although the right to the use of the air in an unpolluted state is clear, yet the damage "must not be fanciful," as stated by Lord Justice Knight Bruce in *Walter v. Selfe*, 4 De G. & Sm. 321. Mowat, V. C., in *Cartwright v. Gray*, says: "I think that the inconvenience made out by the plaintiffs in the present case is, in the language of the same learned judge, 'more than fanciful,' more than one of mere delicacy and fastidiousness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober, and simple notions among the English people."

In *Crump v. Lambert*, L. R. 3 Eq. 413, it was said: "There is, I apprehend, no distinction between any of the cases whether it be smoke, smell, noise, vapour or water, or any other gas or fluid. The owner of one tenement cannot cause or permit to pass over or flow into his neighbour's tenement any one or more of those things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighbouring tenement, or so as to injure his property." *Bliss v. Hall*, 4 Bing. N. C. 183; 7 L. J., N. S., C. P. 122; *Flight v. Thomas*, 10 A. & E. 590.

When will the Court of Chancery interfere by injunction to protect a right or an easement? In England, in the case of *Heath v. Bucknall*, L. R., 8 Eq. 6, Lord Romilly, M. R., said: "It may no doubt be laid down as a general axiom, that where a man possesses a right to light and air over the property of a neighbour, the obstruction of which would be punishable at law in the shape of damages, a Court of Equity will by injunction prevent that obstruction." *Vide* also Kindersley, V. C., in *Wood v. Sutcliffe*, 21 L. J. Chy. 255.

In Ontario, under the Administration of Justice Act, the plaintiff may take his choice of any court, and it is apprehended that where formerly a Court of Law would give damages, now a Court of Chancery may not only grant an injunction, but give damages also. The power of the Court being recognized and ascertained, we shall now consider when the Court, that is, in what case they will exercise the power.

A lessee for a term of years stipulated that he would not carry on any business that would affect the insurance. He made an under-lease omitting any such stipulation, and the under-lessee having commenced the business of rectifying high wines, was restrained. *Arnold v. White*, 5 Chy. 371.

Although the fact that a nuisance has commenced will raise a presumption that the same will continue, still where it was alleged that the nuisance complained of was caused by the discharge of refuse matter from the manufactories of

the defendants, and it was shewn that no such refuse matter had been discharged by them for upwards of a year, they having closed down their manufactories during that period, and if the nuisance was increasing at all it was not through the acts of the defendants, the Court refused an interlocutory injunction restraining the further continuance of such nuisance. 23 Chy. 220.

The case of *Gamble v. Howard*, 1 O. S. 141 and 3 Chy. 281, may be mentioned, as it is a decision with regard to the use of water for a mill.

An averment that the soil of a stream is vested in the Crown, does not import that the Crown has therefore power to interfere with the riparian rights of proprietors; and under the circumstances of the case, the injunction was refused. *Attorney-General v. McLaughlin*, 1 Chy. 34.

“That a stream which flows by the operation of nature only, and in a natural course, is a natural stream, there can be no doubt; but there is some doubt whether a stream which flows from a natural source, but in a channel of a permanent character made by man, ought not in some instances to be deemed a natural stream.” *Holker v. Porritt*, L. R. 8 Ex. 107, decided that it was a natural stream, and this case is well worthy of perusal.

Whether the Court will exercise its power and grant an injunction is a matter of discretion. In *Wright v. Turner* (a), although the damage done to the land was only £2 per annum, the plaintiff having established his legal rights by an action at law, an injunction was granted; while in *Graham v. Northern Railway Co.* (b), although the plaintiff had recovered a verdict at law and established his legal rights, yet on account of the small amount of water taken, the Court refused an injunction.

Again, in *Macaulay v. Roberts*, 13 Chy. 565, the Court granted an injunction, while in *Rich v. Brantford*, 14 Chy.

(a) 10 Chy. 67.

(b) 10 Chy. 259.

83, the Court refused. *Vide* also *Beamish v. Barrett*, 16 Chy. 318; *Rosamond v. Forgie*, 18 Chy. 370; *McNab v. Taylor*, 34 Q. B. 524; *Brewster v. Can. Company*, 4 Chy. 443.

Several cases with respect to dedication may be mentioned: *Municipality of Town of Guelph v. Can. Company*, 4 Chy. 632; *Attorney-General v. Goderich*, 5 Chy. 402; *City of Toronto v. Municipal Council of York and Peel*, 6 Chy. 525; *Attorney-General v. Municipality of Town of Brantford*, 6 Chy. 592; *Wade v. Corporation of Brantford*, 19 Q. B. 207; *City of Toronto v. McGill*, 7 Chy. 462; *Attorney-General v. City of Toronto*, 10 Chy. 436.

What is the meaning of the words "other easements," mentioned in this section? An answer to this question was given in the case of *Webb v. Bird*, 10 C. B., N. S. 268, which was an action brought by the owner of a windmill against a neighbouring landowner, who, by building, obstructed the wind from flowing to the mill. Erle, C. J., says: "It appears to me that this section was not intended to give a right, after twenty years, to every sort of enjoyment which may be classed under the general term 'easement,' but that it was meant to apply only to the two descriptions of easements therein specified, viz., the right to a way or water-course, which may be enjoyed or derived 'upon, over or from any land or water.' I do not think the passage of air over the land of another was or could have been contemplated by the legislature when framing that section. They evidently intended it to apply only to the exercise of such rights upon or over the surface of the servient tenement as might be interrupted by the owner if the right were disputed. It is clear to my mind that that was the intention of the legislature, because the section provides that the claim shall not be defeated where there has been actual enjoyment for the period mentioned without interruption." The words "without interruption" mean without interruption by some reasonable means. *Arkwright v. Gell*, 5 M. & W. 203; 8 L. J., N. S. Ex. 201.

An important case, decided in our courts, may be cited (*Young v. Wilson*, 21 Grant, 144; 611 affirmed), where the question of the assignment of an easement came up.

T., being the owner of 275 acres of land, caused a mill-dam and race to be constructed, and a mill to be erected thereon. For thirty or forty years this mill, or others built on its site, run by water power only, had existed, and were run by the water passing from a natural stream through the race. T. sold to W. the whole property, taking back a mortgage for part of the purchase money on that part of the land through which the race ran, and on which the mill-dam was situated, *excepting, however*, the mill site. It was shewn that the mill could not be supplied with water power otherwise than by the race running through the mortgaged premises. T. afterwards assigned the mortgage to plaintiff, and W. mortgaged the mill and mill-site to D. *Held*, that the right to use the dam and race was a necessary, continuous and permanent easement, and could not be destroyed by the plaintiff, although the servient parcel had been first conveyed without any express reservation of such easement. In rehearing, Blake, V. C., said: "It is out of the question that Tiffany, after allowing this property to be excluded from the mortgage in order that the mill might be built, and knowing that the mill, when built, would be useless unless the easement which had previously been used in connection with the mill formerly there were enjoyed by Wilson, and after it had been enjoyed for seventeen years, can now demand that this easement be extinguished, to the destruction of the mill premises, the building of which he sanctioned. On the principle laid down in the Court of Appeal in *Heenan v. Dewar* (a), and *English v. Hendry* (b), Tiffany is now estopped from such an act."

ASSIGNMENT OF AN EASEMENT.

General words in a deed, such as "appurtenances," &c., will convey any easement which may at that time exist on

(a) 18 Grant, 438.

(b) 18 Grant, 119.

the dominant tenement. But where it is a tenancy by parol, the question arises whether the easement passes. *Skull v. Glenister*, 11 C. B., N. S. 81, would seem to decide that it did. *Vide*, however, *Mayfield v. Robinson*, 7 Q. B. 489, and *Wood v. Ledbitter*, 13 M. & W. 378, in which it was said: "A right of common, for instance, which is a *profit à prendre*, or a right of way which is an easement or right in nature of an easement, can no more be granted or conveyed for life or for years without a deed than in fee simple."

REPAIR OF AN EASEMENT.

The dominant owner may enter the servient tenement and repair the easement. (a)

In our own courts we find the following cases:

Defendant, and those under whom he claimed, had the right to overflow the adjoining lands to an extent not exceeding ten acres, for supplying their mill with water, and which right had been exercised to a certain extent for twenty years or more. In trespass, *quare clausum fregit*, for entering the adjoining close, *held*, that having the right to overflow a part of the plaintiff's close, defendant had, as incident to that right, authority to enter and repair breaches in the natural state of the soil of the dam, but not to add thereto so as to cause additional flow. *Held* also, that the extent to which such right could be maintained, was that to which it was exercised during twenty years after such right accrued, and that a partial overflowing would not keep alive the right to extend the overflow at any time to the full extent of ten acres. *Ruttan v. Winans*, 5 C. P. 379.

Whenever a right to interfere with the natural course of a stream is attempted to be founded upon prescription, the exercise of such right must be shewn throughout the period (with the exception which the Statute allows) to the full extent claimed. *McKechnie et al. v. McKeyes*, 9 Q. B. 563.

(a) *Pomfret v. Ricroft*, 1 Wm. Saunders, 365; *Hamilton v. Vestry of St. George's, Hanover Square*, L. R., 9 Q. B. 42; *Gerrard v. Cooke*, 2 B. & P., N. C. 109; *Colebeck v. Girdlers' Company*, 12 B. D. 234.

In *McKechnie et al. v. McKeyes*, 10 U. C. Q. B. 37, the whole question arose on the sixth plea as to the prescriptive right. We refer to this case more particularly in the notes on the 37th section.

The rights and liabilities incident to water mills have become in Canada, on account of the clearing of the forests and great decrease in the water in the streams, subjects of considerable inquiry. Some difficulty seems to have been experienced by persons, having had for a long period of years a right to the use of water, in being able to obtain what they consider their just rights. For instance, A. has had the use for a long period of years, through himself and those through whom he claims, of the right to use the water of a certain stream for the purposes of a mill. Other mills below his dam have been built. The water throughout the country has decreased. A. builds his dam higher in order to obtain the necessary quantity of water for his mill, and B. (having a mill below A.) complains that he cannot get enough water. Such was the condition of things in the case of *Hunt et al. v. Hespeler*, 6 C. P. 269. The principle there held is embodied in the head-note as follows: "Whenever a right to interfere with the natural course of a stream is attempted to be set up by prescription, the exercise of such right to the full extent must be shewn *throughout the period* for which the right is claimed, and not that the right had accrued within the time allowed by the Act, but had not been exercised till of late." Draper, C. J. (p. 273), says: "The effect of our Prescription Act is to make an enjoyment of an easement for twenty years without interruption presumptive evidence of a right, though such presumption may be displaced by shewing that during that period there was a lease under which the easement tenement was occupied, or that it was held either by a tenant for life or by a person under any of the disabilities specified in the Act [or there was unity of possession; but see *supra*, page 221, Moak's notes.—Ed.]

The right springs from the user for twenty years, while the plea does not assert an actual enjoyment for that period *as of right*, but a right only recently brought into exercise to add to or increase the preceding user. I have been unable to find any English authority bearing on the case, but it appears to me undistinguishable from *McKechnie v. McKeyes*, 9 Q. B. 563, which I mentioned just at the close of the argument; and upon that authority, as well as upon the reason of the thing, I think the plaintiff should have judgment. The defendant appears to me to plead a prescriptive right; in other words, a right arising from twenty years' user, without shewing a *user in fact*. What he really does assert is a dormant right, just brought into exercise, to use the stream to the damage of the plaintiff."

The decisions all seem to agree that the "easement" consists *in the use* of water at the time, and that an owner of an easement would not be allowed to pen back the water in order to get the same supply of water all the year round that he was formerly accustomed to get, to the detriment of his neighbour below him. This, however, would seem not to be the principle, from the remarks of C. J. Robinson, in *Bechtel v. Street*, 20 Q. B. 17. The author submits that the real *easement* is the supply of water necessary to run the mill; and if the supply can only be obtained by raising the dam higher, he can do so, provided he does not overflow the plaintiff's land more than usual, and provided no other person below him have an easement for the over supply.

McNab v. Adamson, 8 Q. B. 119. This was a case for damming back water on defendant's land. *Held*, that the issue was not whether a dam which had been two feet high was made by the defendant three feet high, or being made by others within twenty years, was wrongfully continued by him, but whether the prescriptive right, whatever it might be proved to be, had been exceeded, within twenty years, to the plaintiff's prejudice.

The right of mill-owners to pen back the water is strictly limited to the extent of their rights, and they will be liable for any excess. (a)

The use of bracket boards on a mill-dam is an easement that can be acquired by prescription. *Campbell v. Young*, 18 Chy. 97.

Cases cited for: *Moore v. Webb*, 1 C. B., N. S. 673; *Davies v. Williams*, 16 Q. B. 546; *Tickle v. Brown*, 4 A. & E. 369; *Murgatroid v. Robinson*, 7 El. & B. 391; *Beasley v. Clarke*, 2 Bing. N. C. 705; *Warburton v. Parke*, 2 H. & N. 64; *Beamish v. Barrett*, 16 Grant, 318; *Flight v. Thomas*, 8 Clk. & F. 231; Brown on Statute of Limitations, 400.

Several cases have been decided by our courts with regard to what constitutes a water-course. *McGillivray v. McMillin*, 27 Q. B. 67; *Crewson v. Grand Trunk Railway Company*, 27 Q. B. 68. Vide also *Broadbent v. Ramsbotham*, 11 Ex. 602 (not surface water); *Canon v. Great Western Railway Company*, 14 Q. B. 192; *Vanhorne v. Grand Trunk Railway Company*, 18 Q. B. 356; *McGillivray v. Great Western Railway Company*, 25 Q. B. 73. The cases on p. 73 are well worth looking at in cases against railways. See *Murray v. Davidson*, 19 C. P. 314.

A private right of way might be consistent with a right of way for the public over the same ground. *Johnson v. Boyle*, 10 Q. B. 101. *Plumb v. McGannon*, 32 Q. B. 8, was founded on an application for the disturbance of a private way granted by deed and devised to plaintiff, on which defendant had built a boat-house, on the banks of the St. Lawrence. What was high-water mark was discussed. By Judge Wilson it was said that "high-water mark meant the general and usual limit of water in the summer time, not when the river was swollen in the spring.

(a) *Adamson v. McNab*, 6 Q. B. 113.

In this case also the question as to the passing by will of after acquired property was decided.

The reader will notice that the above case referred to the banks of a navigable river. In *Kains v. Turville* (a), the question, What is the meaning of "water's edge" in a deed, on the banks of a stream not navigable, was decided. C. Robinson, Q. C., counsel for plaintiff, argued: "The rule to be deduced is, that where the deed so describes land as to make it touch the water, one half of the bed of the stream is included, by construction of law, as an appurtenant, and to exclude this construction there must be an express exception or reservation of the bed; nothing less will be effectual."

Draper, C. J., says: "The law is too well settled to require any extended reference to authorities to establish the rule, that in streams and rivers which are not navigable, a description of land which extends to the water's edge carries the grant or conveyance to the thread of the stream." *Plewes v. Hall*, 29 Q. B. 472.

See also, with regard to obstructing streams, *Whelan v. McLachlan*, 16 C. P. 102; *Boole v. Dickson*, 13 C. P. 337. Form of plea, *Corporation of Thurlow v. Bogart*, 15 C. P. 9; *Graham v. Burr*, 4 Chy. 1. Held, that plaintiff was entitled to an injunction against the defendant, restraining him from damming the water back upon the plaintiff's property. Vide also Sir John Leach, in *Wright v. Howard*, 1 S. & S. 203; also *Wadsworth v. McDougal*, 30 Q. B. 369; and *Watson v. Perine*, 13 C. P. 229. As to raising and lowering dam, see *Hickman v. Lawson*, 7 Chy. 494. Remarks also on p. 212, as to the principle involved. *Canada Company v. Pettis*, 9 Q. B. 669.

With regard to license, see *Eastward & Skinner v. Helliwell*, 4 O. S. 38; *Robinson v. Fetterley*, 8 Q. B. 340; *Beaven v. Reid*, 9 Q. B. 152.

(a) 32 Q. B. 17.

In *Robinson v. Fetterley*, above, the remarks of Chief Justice Draper may be quoted as applicable to the difference between a license and an easement. This was an action by plaintiff for penning back the water by defendant on plaintiff's land. License was endeavoured to be proved, but failed in the evidence, as it was given in writing by the brother of the owner of the land, and not by the owner. Draper, C. J., says: "This, as regards the plaintiff, must be considered an easement over plaintiff's land—an incorporeal hereditament or inheritance affecting land—and therefore required a deed to create it."

The remarks of Vaughan, C. J., *In re Thomas v. Sorrell*, Vaughan's Rep. 351, and incorporated in the judgment in *Wood v. Ledbitter*, 13 M. & W. 844, are worthy of notice: "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful. But a license to hunt in a man's park, to come into his house, are only actions which without license had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the act of hunting and cutting down the tree; but as to the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the action of eating, firing my wood and warming him, they are *licenses*; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten and the wood burnt. So, as in some cases, by *consequence* and not directly, and as *its effect*, a dispensation or license may destroy and alter property." Alderson, B., says, in *Wood v. Ledbitter*, 844, 845: "Now, attending to this passage in conjunction with the title 'License' in Brooks' Abridgment, from which, and particularly from paragraph 15, it appears that a license is in *its nature revocable*,

we have before us the whole principle of the law on this subject. A mere license is revocable; but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it so as to defeat his grant, to which it was incident. It may further be observed that a license under seal (provided it be a mere license) is as revocable as a license by parol; and on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol." This was a case of plaintiff buying a ticket to go on the grand stand at the Doncaster Races. Defendant was steward of Lord Eglinton, who was steward of the races, and by whose privity the ticket was sold for one guinea. Plaintiff was put out of the stand by defendant, under orders of Lord Eglinton. *Held*, that the license was revocable although money had been paid.

In *Robinson v. Fetterley*, Robinson, C. J., says: "If the license in writing had been given by the plaintiff himself, or any one by his express authority, my inclination at present is, that although it was not under seal, and therefore insufficient to create an easement, it would be sufficient as a license to prevent the plaintiff from recovering damages for the erection of the dam as a wrongful act, and that *Wood v. Ledbitter*, 13 M. & W. 837, is not an authority to the contrary, because there the party suing was the party licensed, and was claiming damages as the proprietor of an interest which could not pass without deed." It was on the principle that although the grant was only made by parol (in *Hendry v. English*, which went up to appeal, reported in 18 Grant, 119), yet the expenditure of money in building the dam created an interest. Acquiescence also was one of the points of decision in this case.

Prescription. *Rosamond v. Forgie*, 18 Chy. 370. See also *Crossley & Sons (Limited) v. Lightowler*, 3 Eq. 296;

Bickett v. Morris, L. R., 1 H. & L. 47; *Sampson v. Hoddinott*, 1 C. B., N. S. 590; which are all good cases with regard to the use of water and prescription.

Craske v. Huffman, 27 Q. B. 116. Construction of a deed with regard to use of water. *Held*, that plaintiff was entitled to sufficient water to drive his mill before the defendant could use any; and that the defendant was not, by the proviso, entitled at all events to enough to turn one water wheel. *Bishop v. Merkley*, 8 Q. B. 335.

In *Gooderham v. Routledge*, 10 Chy. 398, it was held that an easement was extinguished by unity of possession in the mortgagor, and that consequently the whole water passed to the mortgagee, freed from the easement that mortgagor had formerly created over another piece of land. In this case, Mr Gwynne contended that a water-course was different from a way, and the easement revived after severance of the unity of possession. The Chancellor quoted Whitlock, J., in *Sury v. Pigott*, Palmer, 444: "There is a difference between a way, a common, and a water-course. Brackton, lib. iv. f. 221, 222, calls them *servitutes prædiales*, those which begin by a private right, by prescription, by assent, as a way, common, being a particular benefit, to take part of the profits of the land: this is extinct by unity because the greater benefit shall drown the less; a water-course doth not begin by prescription nor yet assent, but the same doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted." Woolrych, in his treatise on water-courses, says: "Things which have an existence during the unity are not extinguished by the unity." Thus, where one tenement was held in fee, and the other for a term of years, it was held that this union did not extinguish but merely suspended the easement during the unity of possession, and that the right revived on severance of the tenements. *Vide Thomas v. Thomas*, 2 C. M. & R. 34; *Simper v. Foley*, 2 John. & H. 555. To extinguish the

easement there must be unity of *seisin* (a). *McLean v. Crossan*, 32 Q. B. 448.

Riparian proprietors; use of water. *Embrey v. Owen*, 6 Ex. 353; *Wright v. Howard*, 1 Sim. & Stuart, 190.

The taking of water from streams is a question of degree; every riparian owner has a right to the reasonable use of the water, provided that water is used for the benefit of the riparian estate. (b)

“Reasonable use” is difficult to define; and what would be a reasonable use in Canada, with such magnificent rivers as we possess, would be considered unreasonable in England, where they have such little streams. Thus, in the case of *The Medway Navigation Company v. The Earl of Romney*, it was held that taking water from a flowing stream to supply a jail or a lunatic asylum was an unreasonable use, and more extensive than a riparian owner had a right to. It is hard to imagine any jail or lunatic asylum in Canada, the supply of which would have any effect on our rivers. As to supply of a town, see *The Wilts and Berks Canal Navigation Company v. The Swindon Water-works Company*, L. R. 9 Chy. App. 451.

Miner v. Gilmour was an appeal to the Privy Council from the Courts in Lower Canada (c). Here Lord Kingsdown made a distinction between the ordinary and the extraordinary use of water. “By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for his domestic purposes, and for his cattle; and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But further, he has the right to the use of it for any purpose, or what may be deemed the extraordinary use

(a) Goddard on Easements, 364.

(b) *Lord Norbury v. Kilchin*, 3 F. & F. 292.

(c) 12 Moore, P. C. 156.

of it, provided that he does not interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purposes of a mill or divert the water for the purposes of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water and inflicts upon them a serious injury.”

Use of water to irrigate lands. *Wood v. Ward*, 3 Ex. 748, 18 L. J. Ex. 305; *Sampson v. Hoddinott*, 1 C. B., N. S. 603.

For manufacturing purposes. *Dakin v. Cornish*, 6 Ex. 360.

The use of water for turning water wheels has already been fully mentioned, and the cases cited. Still the question appears to us to be always cropping up, whether the prescriptive right by user for twenty years does not consist in the use of a supply sufficient to run the mill irrespective of the height of the dam, and irrespective of the fact that by the clearing of the country the water has sensibly diminished in the stream? Goddard (p. 243) says: “If a part of the water of a stream has been for so long a time diverted to a mill that the mill owner has acquired a prescriptive title to divert it, his right is limited to the diversion of *that quantity of water* which he has been accustomed to divert, and he cannot, by altering his machinery, suddenly acquire a more extensive right.” (a)

POLLUTION OF STREAMS.

“If the pollution at its commencement was defined in amount, and originated from a certain cause, as the erection and use of a factory, a prescriptive right may be acquired and the measure of the right will be the extent of pollution at the commencement of the user; but if there has been no defined commencement, no right can be gained, as no grant can be presumed.” *Crossley & Sons v. Light-*

(a) *Bealey v. Shaw*, 6 East. 209; *Brown v. Best*, 1 Wils. K. B. 174.

owler, L. R. 2 Chy. App. 478; *Goldsmid v. The Turnbridge Mills Improvement Commissioners*, L. R., 1 Eq. 161.

In *Baxendale v. McMurray*, L. R. 2 Chy. App. 790, the question was whether a manufacturer of paper had the same right to pour the refuse from his mills when working up esparto grass as he had when working up rags.

If a man has a right to pour clean water over the servient tenement and he pours dirty water, "every particle of the water ought to be stopped, for it is all dirty." Alderson, B., in *Cawkwell v. Russell*, 26 L. J. Ex. 24. Pollock, B., there says, quoting *Renshaw v. Bean*, 18 Q. B. 112: "If a man has a limited right to the use of a window, and he enlarges it considerably, the only way in which the person who is annoyed by the enlargement of the window can prevent that nuisance is by erecting a barrier and stopping the whole up." This was, however, overruled in *Tapling v. Jones*. By granting away a piece of his land which does not abut on a stream, the grantee does not become possessed of riparian rights (a). Can there be an assignment of riparian rights so that the assignee and those claiming under him would hold the rights though they did not own the land? Pollock, B., and Channell, B., in the case of *Nuttall v. Bracewell* (b), thought that such an assignment would be only effectual against the assignor; but Bramwell, B., thought that no reason could be shewn why a person could not assign his riparian rights in the same way and with the same effect as a person can assign any other species of property.

Referring to the case of *Kerr v. Coghill*, before mentioned, Moak's notes on *Finlinson v. Porter*, L. R. 10 Q. B. 188, are here inserted, as the cases there mentioned appear to be very pertinent to the subject: (c)

"Where the owner of land has, by any artificial arrangement, effected an advantage for one portion to the burden-

(a) *Stockport Water Co. v. Potter*, 3 H. & C. 300.

(b) L. R. 2 Ex. 1; 36 L. J. Ex. 1.

(c) Moak's Notes on Cases decided by the English Courts, Vol. XII., pp. 256-259.

ing of the other, upon a severance of the ownership, the holders of the two portions take them respectively charged with the servitude and entitled to the benefit *openly* and *visibly* attached at the time of the conveyance of the portion first granted.

“Accordingly, where the owner of land across which a stream flows has diverted it through an artificial channel, so as to relieve a portion of it formerly overflowed, which he then conveys, neither he nor his grantees of the residue can return the stream to its ancient bed to the damage of the first grantee.

“Such benefits not naturally attached to the premises purchased, but previously conferred upon it at the expense of the other land of the grantor, do not depend upon covenant, but remain attached to the tenement conveyed, unless the right to subvert them is expressly reserved. The rule, which is general in its application to easements, which are continuous, *i. e.*, self-perpetuating independently of human intervention, as the flow of a stream, is, it seems, restricted in the case of *discontinuous easements* to such as are *absolutely necessary* to the enjoyment of the property conveyed. *Lampman v. Milks*, 21 N. Y. 505; (see 4 Am. Law Review, 50); *Babcock v. Utter*, 1 Abbott’s Court of Appeals Dec. 55, 1 Keyes, 427; *Beals v. Stewart*, 6 Lansing, 408; *Janes v. Jenkins*, 34 Maryland, 1; 5 Am. Law Times Rep. 111; 6 American Rep. 300, and note p. 306; *Curtiss v. Ayrault*, 47 N. Y. 73; *Voorhies v. Burchard*, 6 Lansing, 176; *Coolidge v. Hager*, 43 Vermont, 9; *Denton v. Leddell*, 23 New Jersey Eq. 64, affirmed 24 New Jersey Eq. 567; *Polden v. Bastard*, L. R., 1 Q. B. 156; *Cocheco Co. v. Whittier*, 10 N. H. 395; *Stackpole v. Curtis*, 32 Maine, 383; Washb. Eas. 309–311 Marg. p.; *Hurd v. Curtis*, 7 Metc., 94; *Frey v. Witman*, 7 Penn. St. 440; *Crosby v. Bradbury*, 20 Maine, 61; *Gibson v. Brockway*, 8 N. H. 465; *Provost v. Calder*, 2 Wend. 517; *Oakley v. Stanley*, 15 Wendell, 523.

“See the subject discussed, 4 American Law Review, 40-62, and also *Stevens v. Dennett*, 31 N. H. 324; see *Tabor v. Bradley*, 18 N. Y. 109, for an exception to the rule, which case was commented upon in *Babcock v. Utter*, 1 Abbott's Court of Appeals Dec. 56, 1 Keyes, 427.

“If the owner of property has acquired an easement upon lands of another, such easement will pass as an appurtenance to the dominant tenement. *Voorhies v. Burchard*, 6 Lansing, 176.

“Otherwise if before conveyance he acquire title to the servient tenement also. *Scott v. Bentel*, 23 Gratt. (Va.), 1; *Whalley v. Thompson*, 1 Bos. & Puller, 371; but see *Thomas v. Thomas*, 2 Crompt. Mees. & Rosc. 34.

“A right to support of a house conveyed will pass as against the grantee of an adjoining house. *Richards v. Rose*, 9 Exch. 218; 2 Com. Law Rep. 311; 2 Am. Law Reg. (O. S.), 178. But see *Angus v. Dalton*, 3 L. R., Q. B. D. 85, and *supra*.

“And if the *manner* of conveying water over the land of the servient tenement be changed by the owner thereof without objection for a long time by the owner of the easement, the latter will be deemed to have acquiesced in the change. *Arnold v. Hudson River R. R.*, 49 Barb. 108.

“The owner of such an easement is not restricted to maintaining the easement in the condition it was at the time of his purchase, but may make proper repairs thereon. *Beals v. Stewart*, 6 Lansing, 408.

“See note 6 American Rep. 306; *Thomas v. Thomas*, 2 Crompt. Mees. & Rosc. 34.

“But he must take no more than is *reasonable*. *Voorhies v. Burchard*, 6 Lansing, 176.

“Nor is the owner restricted to the use of water or a way which passes as an appurtenant for the purpose for which it was used at the conveyance. *Watts v. Kelson*, L. R., 6 Chy. App. 166.

“The owner of an easement of drip may raise his walls provided he do not increase the drip. *Thomas v. Thomas*, 3 Crompt., Mees. & Roscoe, 34; *Harvey v. Walters*, 4 Eng. Rep. 392.

“So if the eaves of a house have projected over the lands of another for more than twenty years, the owner of the house has no title in the land of such other person under the eaves, and cannot prevent him from building on the land if he can do so without interfering with the eaves. *Keats v. Hugo*, 115 Mass. 204.

“Held that the following clause in a deed of land ‘reserving to myself the *use* of a well in the highway in front of said land,’ created a reservation, and not an exception, it appearing that the water in the well was ample for the use of both parties, and that therefore the grantor had no right to change the manner of obtaining water from the well, so as to exclude the grantee from its *use*. *Barnes v. Burt*, 38 Conn. 541.

“The rule of law which creates an easement in favour of one of two tenements or heritages belonging to a single owner, upon the sale of one of them, is confined to cases where there is an *apparent* sign of servitude on the part of the other, which would indicate its existence to a *person reasonably familiar with the subject upon an inspection of the premises*. *Butterworth v. Crawford*, 46 N. Y. 349, reversing 3 Daly, 57; *Scott v. Bentel*, 23 Grattan (Va.), 1. But see *Watts v. Kelson*, L. R., 6 Chancery Appeals, 166; *Hamel v. Griffith*, 49 How. Prac. 396; *Geoghegan v. Fedan*, Irish Rep. 6 Com. Law, 139.

“The owner of two adjoining houses and lots in the city of New York, known as numbers 83 and 85, built a vault half on the lot of each, extended the division fence over the vault, and then erected an outhouse for each dwelling on either side of the fence over the vault. A drain from the vault ran through the Lot No. 85. Defendant purchased No. 85, receiving a full covenant deed without reservation.

After that plaintiff purchased No. 83. Defendant closed up the drain. *Held*, the servitude was not apparent, and no easement existed in favour of No. 83. *Butterworth v. Crawford*, 46 N. Y. 349, reversing 3 Daly, 57. But see *Geoghegan v. Fegan*, Irish Rep. 6 Com. Law, 139; *Watts v. Kelson*, L. R., 6 Chancery Appeals, 166, and *Hamel v. Griffith*, 49 How. Prac. 306.

“Though while the grantor of a house from which a drain runs over other lands belonging to him remains the owner of such servient tenement, he will be restrained from interfering with the drain. It is only a *bona fide* purchaser who has no knowledge of the drain at the time of his purchase who takes discharged of the easement. *Hamel v. Griffith*, 49 How. Prac. 306; *Geoghegan v. Fegan*, Irish Rep. 6 C. L. 139.

“It is, however, only such easements as are essential to the enjoyment of the property granted which pass. Where the defendant owning a grist-mill and the lands around it, had been accustomed to use an open space on the west side for mill purposes mainly for customers to pass to and from the mill, and finally sold the mill and appurtenances but no land west of the mill, it was held that the grantee took no right of way over said open space, the mill being otherwise accessible.

“If there had been a right of way appurtenant to the mill over the defendant’s said land prior to his purchase of the mill, it ceased to exist when the title of the mill and the land west of it were united in the defendant; and it having been so extinguished, and as the defendant retained the land west of the mill when he sold the mill, the sale would not revive the easement. *Plimpton v. Converse*, 42 Vermont, 712. See also *Denton v. Leddell*, 23 New Jersey Eq. 64, affirmed 24 New Jersey Eq. 567; see also *Stevens v. Dennett*, 51 N. H. 324; *Whalley v. Thompson*, 1 Bos. & Puller, 371.

“The presumption of law that where the owner of an entire tenement divides the same and conveys a portion, the parties contract with reference to the visible physical condition of the property at the time, may be repelled by actual knowledge on the part of the contracting parties of facts which negative any deduction to be drawn from the apparent condition. Where there is proof of such knowledge, they are presumed to have contracted not solely with reference to its condition, but as it was known to be by the parties. *Simmons v. Cloonan*, 47 N.Y. 3, reversing 2 Lansing, 346; *Curtiss v. Ayrault*, 47 N.Y. 73.

“H. & L., being the owners of certain premises upon which was a mill known as the ‘old mill,’ erected a dam and reservoir, and constructed a flume to convey the water from the reservoir to the mill. H. having acquired title to the whole premises, conveyed the ‘old mill’ property to B. The deed contained a grant of the rights and privileges to use the water of the reservoir for the use of the mill, and a condition that in case the mill should not be kept in use, the water privilege and right of flowage should cease and revert to H. H. subsequently contracted to sell to B. a portion of the premises lying between the ‘old mill’ and the reservoir. B. erected thereon a mill, took the water from the reservoir for its use, abandoning the ‘old mill,’ and thereafter assigned the contract to S., to whom H. conveyed *pursuant to the contract*. Neither the contract nor the deed made mention of the water privilege. S. conveyed to plaintiff. Subsequently H. conveyed the lands upon which was the reservoir to defendant C., who proceeded to fill up the reservoir and remove the flume. *Held*, that the deed to L. related back to the date of the contract of sale, and was not a contracting between the parties in reference to the condition of the property at the date of the deed; that the right to the use of the reservoir and flume did not pass as an incident or appurtenance to the premises so conveyed, and that by the abandonment of the use of the ‘old

mill' the rights of water and flowage reverted to H., and his grantee had the right to fill the reservoir and take up the flume. *Simmons v. Cloonan*, 47 N. Y. 3, reversing 2 Lans. 346; see also *Stevens v. Dennett*, 51 N. H. 324.

“One tenant in common cannot, by his sole act, create an easement in the premises held in common. Nor can a tenant in common, who owns other premises, in severalty, so use the last as to acquire or exercise, for the benefit thereof, an easement in the property held in common; and he cannot by grant, or by operation of an estoppel or otherwise, confer upon another rights and privileges which he does not possess. *Crippen v. Morss*, 49 N. Y. 63; *Hutchinson v. Chase*, 39 Maine, 508.

“Where, therefore, a tenant in common, in a grant of premises held by him in severalty, has attempted to create an easement in the premises held in common, a subsequent grantee of all the tenants in common is not estopped by the fact of his succeeding to the interests of the one who granted the easement from asserting, as a grantee of the co-tenants, the invalidity of the grant of the easement, and as against him it is void. *Crippen v. Morss*, 49 N. Y. 63.

“It has been held that the grant of an easement to A. B. without adding ‘and to his heirs and assigns,’ does not restrict the grant to A. B. during life only nor to him personally. *Coolidge v. Hager*, 43 Vermont, 9.”

The following cases are important:

“A railway company taking land compulsorily contracted to make communications by level crossings between two severed portions of an estate. The estate then consisted of marsh or mud land, and was subject to a statutory prohibition against being built upon. The prohibition having been afterward removed, and the land becoming applicable for building purposes, *held*, that a right of way over, under or across a railway was *prima facie* general, and not restricted to purposes to which the land was applicable at

the time the right arose, and the right being unrestricted in terms gave the owners and occupiers of the land the use of the level crossings for all purposes connected with houses or buildings subsequently erected or to be erected on the estate, but not so as to obstruct the proper working of the railway." *United Land Co. v. Great Eastern Railway*, 7 Eq. C. 738.

"A custom for the inhabitants of a parish to enter upon certain land in the parish, and erect a maypole thereon, and dance around and about it, and otherwise enjoy on the land any lawful and innocent recreation at any times in the year, is good." *Hall v. Nottingham*, 15 Ex. Div. 254.

"The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property, where that would impose a greater burden on the servient tenement. Where a road had been immemorially used to a farm not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farm house and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm, *held*, that that did not establish a right of way for carting the materials required for building a number of new houses on the land. *Wimbleton, &c., Conservators v. Dixon*, 15 Ch. Div. 783. *Seem*, the fact that the occupiers of the farm, in passing with carts from a particular point to a certain gate over a common on which no definite road was marked out, did not keep to one line, but used several tracks, did not prevent their acquiring a right of way between that point and the gate." *Ibid*.

"The plaintiff was the owner of certain premises, the eaves of which projected over adjoining land of the defendant's, and had become entitled by length of user to have the rain water drop from such eaves on to the defendant's land. The plaintiff, in rebuilding his premises, carried the wall abutting on defendant's land to a slightly greater height than

before, and consequently raised the height of the eaves from the ground to the same extent. *Held*, that, in the absence of any evidence that a greater burden was thrown on the servient tenement by the alteration, the easement was not thereby destroyed, and the plaintiff was entitled to the right of eavesdrip from the premises as altered." *Harvey v. Walters*, 6 C. P. 392.

"P. was the owner of an inn, the yard of which was approached by a passage over adjoining property of M. P. and M. agreed to alter their boundary, and substitute a new passage for the old one. M. accordingly, in 1855, conveyed to P. a small strip of land reaching across the end of the new passage where it entered the yard, and granted to P., his heirs and assigns, 'rights of way at all times and for all purposes along a passage intended to run between the piece of land hereinbefore conveyed and a street called the Tyrrels.' By another deed P. released his rights of way over the old passage. The plaintiff was a lessee of the inn and yard under P. The defendants were tenants of M. occupying warehouses on his property, and the bill was filed to prevent the defendants from allowing carts and waggons to remain stationary in the passage in course of loading and unloading, so as to obstruct the access to the yard. *Held*, that the necessity of the business of the defendants did not give them any right to occupy the passage by stationary obstructions when other persons having a right of way required to pass. *Thorpe v. Brumfitt*, 6 Chy. App. 554. *Held*, further, that the right of way was not a right in gross, but was appurtenant to the property occupied by the plaintiff, so that his lease gave him a right to the enjoyment of it." *Ibid*.

"Defendant was owner in fee of a dwelling-house, together with a cottage and stable belonging to it, called 'Roseville,' and was also owner in fee of an adjoining farmstead and farm, having a private road which led from a high road to the farm buildings and passed close to one

side of the stable of Roseville. By indenture of the 1st of May, 1860, defendant demised Roseville to H. for ten years. H. entered on the premises, and built over the stable a hay loft, with two openings toward the private farm road, having first obtained permission from defendant to do so, and also permission from defendant and the then tenant of the farm to use the farm road for the purpose of bringing hay, straw, etc., to the loft, that being the only access to the openings in the loft. H. and the sub-tenants occupying Roseville continued during the term to use the road up to May, 1870; at that time plaintiff agreed to purchase Roseville of defendant; and by deed of the 2nd of August, 1870, Roseville, &c., was conveyed by defendant to plaintiff in fee, 'together with all . . . ways and rights of way, . . . easements and appurtenances to the said dwelling-house, cottage and hereditaments, or any of them appertaining, or with the same or any of them now or heretofore demised, occupied or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto.' *Held*, that the right to use the farm road for the aforesaid purposes passed to the plaintiff under the above words." *Kay v. Oxley*, 13 Q. B. 296.

"The grantee of a right of way which has been obstructed by the grantor has a right to deviate over the grantor's land; and the grantee is entitled to have this right protected by the Court so long as the obstruction exists, without the necessity of proceeding against the grantor for the removal of the obstruction." *Selby v. Nettlefold*, 8 Chy. App. 770.

"Notice of a right of way, and also of an obstruction to it, held to be notice of the grantee's right of deviation." *Ibid.*

"A landowner, who has demised for a term of years the right of shooting over his lands, is not thereby prevented from cutting timber as he thinks fit in the ordinary management of his land, although injurious to the shooting." *Gearns v. Baker*, 12 Chy. App. 760.

“By indenture executed by both parties, defendant conveyed to plaintiff in fee certain land, ‘subject, nevertheless, to the joint ownership and right to the use by the defendant and the owners and occupiers for the time being, of certain adjoining land, as then enjoyed by him or them, but no further or otherwise, of the drain running through or laid in the land conveyed, and the course and direction of which was delineated on a plan in the margin of the deed, and subject to the right of the defendant and the occupiers, etc., at all reasonable times to enter upon the land thereby conveyed, for the purpose of repairing the drain and laying or replacing pipes therein.’ The local board of health, under s. 49 of 11 & 12 Vic. cap. 63, after the above conveyance, constructed a new sewer (in lieu of the old one, into which the drain discharged the sewerage from the plaintiff’s and defendant’s premises), at a lower depth; and the defendant thereupon lowered the drain between two and three feet and put fresh pipes (but in the course of the old drain), in order to adapt it to the new sewer. Plaintiff having brought an action of trespass, *held*, that the effect of the deed, executed by both parties, was either to create a tenancy in common in the drain between the plaintiff and defendant, or only an easement in the defendant; but that, in either view, the defendant had done no more than he had the right to do. *Finlinson v. Porter*, 12 Q. B. 250.

“Where an easement to land has been granted, the use of that easement will be restricted to a reasonable use for the purpose of the land in the condition in which it was when the grant was made.” *Wood v. Saunders*, 14 Chy. App. 805.

As to the question of lateral support, a recent and very full case is *Wheelhouse v. Darch*, 28 C. P. 269.

The plaintiff owned a dwelling-house for twenty years, and the defendant, intending to erect a house on her land adjoining, employed an architect, who drew the plans, whereby trenches to lay the foundations in were to be dug

adjoining the plaintiff's foundation wall, and the depth of the trenches was shewn. This work was let out to a contractor; and through his negligence in digging the trenches, &c., the wall of the plaintiff's house fell. *Held*, that the defendant was liable for the damage which arose, not in a matter collateral to, but in the performance of the very act which the contractor was employed to perform. *Held* also, that the plaintiff by twenty years' user, his house having been built for that time, had acquired, if that were necessary to maintain this action, the right to support for his house from defendant's adjacent soil.

This case, with regard to the liability of a contractor, was decided following *Bower v. Peat*, L. R., 1 Q. B. D. 321, where Cockburn, C. J., speaks of the case of *Bonomi v. Backhouse*, 9 H. L. C. 503. The doctrine there laid down is that the taking away of the soil, to the support of which an adjoining owner is entitled, is not *in se* wrongful, and therefore, where the defendant had bound the contractor only to take away such soil and do such work as could be done without hurting the plaintiff, he was not liable.

Hagarty, C. J., says: "I wish to be understood as not deciding that a twenty years' possession was necessary to entitle the plaintiffs to recover." *Wheelhouse v. Darch*, 28 C. P. 277. See also *Butler v. Hunter*, 7 H. & N. 826; *Ellis v. Sheffield Gas Co.*, 2 E. & B. 767; *Overton v. Freeman*, 11 C. B. 867; *Knight v. Fox*, 5 Ex. 721.

Gwynne, J., says: "The principle established is that where the act which causes the injury complained of is purely collateral to and arises incidentally in the manner of performing a work which the person actually causing the injury has been lawfully employed to execute, the employer is not liable, because he never authorized the particular act to be done which caused the injury, but that where the employer has contracted with another to do a particular thing from the doing of which, negligently or otherwise, the injury arises, then the employer is liable." *Wheelhouse v. Darch*, 28 C. P. 278.

In *Reedie v. London & N. W. R. R.*, 4 Ex. 253, a case in point, Platt, B., says: "Suppose the occupier of a house were to direct a bricklayer to make certain repairs to it, and one of his men through his clumsiness were to let a brick fall upon a passer by, is the owner to be liable?"

The case of *Angus v. Dalton*, 3 Q. B. D. 85, is one of great importance, and leaves the law in a rather unsettled condition. Two houses had been standing for over a hundred years. Twenty years before action brought, plaintiffs took down one of them and built a large coach factory. Defendants now took down the other; but in doing so, Dalton, one of the defendants, who was employed as contractor, did not leave enough lateral support, and plaintiffs' coach factory toppled over. Action was brought for damages.

The Court differed, Lush, J., holding for plaintiffs, and Cockburn, C. J., and Mellor, J., for defendants.

Lush, J., says: "It seems to me to be the necessary consequence of the Limitation Act, that such an easement should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired, and not a title to that which is essential to its existence—that the law which bars the owner from recovering the tenement itself after he has acquiesced in a usurped ownership by another for twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period. I cannot help thinking that the revolting fiction of a lost grant may now be discarded, in view of the necessary effect of the Limitation Act upon such an easement as this."

The conclusion of the majority of the Court was that "any presumption arising from length of enjoyment, as respects the easement of lateral support to houses or other buildings, is one which, both at common law and since the

Act of 2 & 3 Will. IV. s. 71, is open to be rebutted; and that if the fact that *no grant was ever made* is established, or from the circumstances none can be implied, the presumption fails. It is beyond all question in this case that no grant was ever made, or assent ever given. It is equally certain that there are no circumstances from which any grant, or agreement to make a grant, or assent in any form, can be implied."

Cockburn, C. J., says: "The true principle is, as it seems to me, correctly stated in Mr. Goddard's learned and able treatise on the Law of Easements, p. 90: 'The whole theory of prescription depends upon the presumption of a grant having been made. If, therefore, it can be shewn that no grant could have been legally made, or that any easement lawfully created must have been subsequently extinguished by unity of seisin or otherwise, or if it can be shewn to be a very improbable thing that a grant ever was made, the presumption cannot arise, and the title by prescription fails.' An instance in which such a presumption failed is to be found in the case of *Barker v. Richardson*, 4 B. & A. 579. There lights had been enjoyed for more than twenty years over land which during part of the time had been glebe land. The defendant, a purchaser under 55 Geo. III. cap. 147, had obstructed the lights. It was held that a grant could not be presumed, inasmuch as the rector, being only tenant for life, was incompetent to grant such an easement."

36. Where the access and use of light to or for any dwelling house, workshop, or other building, has been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly made or given for that purpose *by deed or writing*. C. S. U. C. cap. 88, s. 38.

5th March 1880.

This is taken from 10 & 11 Vic. cap. 5, s. 3, which was taken from 3 & 4 Will. IV. cap. 71, s. 3.

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“A right to the access and use of light to a house cannot be acquired under 2 & 3 Will. IV. cap. 71, s. 3, by the lapse of time during which the owner of the house, or his occupying tenant, is also the occupier of the land over which the right would extend.” (a)

This case is an important one, as it reverses the judgment of V. C. Stuart, which was founded on the facts more than the law. He says, p. 765: “Then another question has been argued for which I think there has been no authority cited, and upon which I do not consider it necessary to express an opinion, and that is, whether the owner of the freehold of a dominant tenement can have his right prejudiced by a unity of possession acquired without his knowledge by his tenant?”

Lord Hatherley, in reviewing the judgment of Sir James Stuart, says: “The proposition that the enjoyment must be distinct has, I think, never been questioned, and would seem at once to approve itself to common sense and judgment. The Statute could not have meant to confer upon a man a right he in no way required to have conferred upon him, namely, a right to enjoy that which he could not be prevented from enjoying so long as he was the occupier of the piece of land on which the impediment to his light might be raised. *Harbidge v. Warwick*, 3 Ex. 552, is a clear case of an owner in fee taking a lease from year to year from the owner of the adjoining land; and then this question might arise—a question which I have had occasion previously to consider—whether, if a man chooses to let his land continuously from year to year, so that he might at the expiration of any year have declined to let it any longer, and have erected a building so as to obstruct the light; whether in such a case as that he must not take the consequences of his own folly, if he does not choose to obstruct the light. This, however, was in *Harbidge v. Warrick* held not to be law. That case went upon this simple ground,

(a) *Vide Ladyman v. Grave*, 6 Chy. App. 763.

that this was an easement like any other easement, and that the law does not allow the co-existence of an easement in land with the possession of the easement itself. Undoubtedly, as in the case of all other easements, the accruing right to the easement is suspended, but only suspended during the unity of the possession; so that if it had been shewn that the enjoyment had lasted for fifteen years and upwards, and then there had been interruption by unity of possession—in such a case, an enjoyment for twenty years could have been pleaded. The interruption (if such it may be called) by the unity of possession, is not an interruption in the sense indicated by the Statute, which means an adverse interruption.” How does this agree with *Gooderham v. Routledge*, 10 Chy. 398.

Attention is called to the case of *Kerr v. Coghill*, mentioned *infra*.

There are two cases in our courts with regard to *lights*: *Brummel v. Wharin*, 12 Chy. 283; and *Biggar v. Allan*, 15 Chy. 385.

The owner of two adjoining shops leased one to plaintiff and the other to defendant. The plaintiff's shop window had been so constructed as to present a side view to persons coming along the street, the object being to attract their attention, and obtain their custom for the wares displayed in the shop; and the privilege was shewn to be a very important one. The tenant of an adjoining shop having placed a shew-case in an open space or doorway of his shop, so as to intercept the view of the plaintiff's window, was restrained by injunction from continuing the obstruction. But see, with regard to a similar case, *Smith v. Owen*, 35 L. J., Chy. 317, where the plaintiff was owner of a shop in Bond Street, and the defendant, who was owner of the adjoining premises, began to make alterations which it was anticipated would have the effect of preventing the shop of the plaintiff being seen so far down the street as usual. Sir W. Page Wood, V. C., refused to interfere on this

ground, for he said that all that could be complained of was that persons could not see the goods so soon as they might if the alterations objected to had not been made; that when they came in front of the shop window, the goods would be seen just as well as before. See also *Butt v. Imperial Gas Company*, L. R., 2 Chy. App. 158.

The case of *Riviere v. Bower*, Ry. & Moo. 24, seems to be almost identical with *Brummel v. Wharin*.

Mr. Goddard says, at p. 78: "But though there is some conflict of authority on the point, the law is now settled that the vendor of the land would have no right to light for his house, reserved by implied grant, in the absence of express stipulation." See also *Potts v. Smith*, L. R. 6 Eq. 311; 38 L. J. Chy. 58.

The plaintiff filed his bill to restrain certain of the defendants from closing windows that looked across a lane of which plaintiff claimed to be owner, and on which defendants were erecting a building some time before the commencement of this suit. It appeared in evidence that the plaintiff had no title to the lane, but that the former owner of it had given him to understand that the lane would never be built on. At the hearing, the plaintiff was allowed to amend his bill by striking out the part claiming title to the lane; and a perpetual injunction was granted restraining the defendants from closing the lane—the delay in filing the bill having been satisfactorily accounted for—with costs, less those occasioned by plaintiff's claiming title to the lane. *Biggar v. Allan*, 15 Chy. 385.

This section differs materially from s. 35, or s. 3 of 2 & 3 Will. IV., and differs materially from s. 2. In the former section, a grant was implied or assumed, and, as we have shewn, the Statute did not take away any of the old common law rights.

As to the present action, however, Coleridge, J., says, in *Truscott v. Merchant Taylors' Company*, 11 Ex. 855:

“The case turns upon the construction to be put on s. 3 of Lord Tenterden’s Act, which is addressed merely to the question of access of light. That section simplifies, and almost new founds, the right to access of light. It founds the right upon the actual enjoyment for the full period of twenty years without interruption, unless that enjoyment be shewn to be had under a consent *in writing*. It puts the right, therefore, on the simplest foundation with the simplest exception.”

After this, the case of *Tapling v. Jones*, 11 H. L. C. 290, was decided in the House of Lords, and a principle was laid down entirely affirming the opinion of Coleridge, J. The Lord Chancellor said that “the right to what is called an ancient light now depends upon positive enactment, and therefore ought not to be vested on any presumption of grant or fiction of a license having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise arise from uninterrupted user or possession during the requisite period. This observation is material, because I think that error, in some decided cases, has arisen from the fact of the Courts treating the right so originating in a presumed grant or license.”

Malins, V. C., in the case of *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 426, doubted the decision of the House of Lords, viz., that the right was created solely by the Statute. But see *Truscott v. The Merchant Taylors’ Company*, 11 Ex. 855, and *Frewen v. Phillips*, 30 L. J., C. P. 351; and in the case of *Flight v. Thomas*, 11 A. & E. 695 (a), Maule, B., expressed an opinion that the words “claiming right thereto,” were purposely omitted in the third section of the Act.

“It is not every case of severance of houses and land that a grant of a right to light can be implied. To take the

(a) *Mayor of London v. The Pewterers’ Company*, 2 M. & R. 409.

above three cases in succession. If a man sells a house which has windows overlooking adjoining land which he retains, he cannot afterwards stop the light from coming to the windows of the house by building on the land; for when granting the house, he is presumed to have granted also a right to light to the windows, and he may not subsequently derogate from his own grant; so also, if after selling the house he sells the land to a third person, the latter may not obstruct the light from the windows, for the vendor could only convey the land subject to the same burdens to which it was subject in his own hands (*a*). In a case, however, where the grantor of a lease of a house for twenty-one years was himself lessee for four years of some neighbouring premises which were so low in construction that they did not prevent the light coming to the windows of the house, and he subsequently purchased the low buildings in fee, it was held that the implied grant of right to light was limited to the term the grantor had in the low buildings at the date of the lease of the house, that is, the four years, and that the fact of the subsequent purchase of the freehold estate in fee in the low buildings did not extend the implied grant of the right to light to a longer term (*b*). If, on the contrary, the owner of a house and land sells the land and keeps the house, there is no such grant by the purchaser of the land implied; for if the conveyance is absolute and without any reservation of easements, there is no ground for presuming an intention that a right to light should be reserved by the vendor or granted by the purchaser (*c*). If the house and land are sold simultaneously to different persons, the case is similar to a sale of the house when the land is reserved, for

(*a*) *Coutts v. Gorham*, Moo. & Mal. 396; *Cox v. Mathews*, 1 Vent. 239; *Palmer v. Fletcher*, 1 Lev. 122, Sir T. Raym. 87; *Palmer v. Paul*, 2 L. J., Chy. 154; *Robinson v. Grave*, L. R., Weekly Notes, 1873, p. 83.

(*b*) *Booth v. Alcock*, L. R., 8 Chy. App. 663; 42 L. J., Chy. 567.

(*c*) *White v. Bass*, 7 H. & N. 722; 31 L. J., Ex. 283; *Curriers' Company v. Corbett*, 2 Dr. & Sm. 355; *Ellis v. The Manchester Carriage Company (Limited)*, 2 C. P. D. 13.

the vendor is presumed to grant a right to light to the purchaser of the house, and the purchaser of the land takes it subject to the restriction that he may not build so as to obstruct the light." (a)

A covenant for quiet enjoyment does not mean that the enjoyment of light and air should not be disturbed (b). As to the effect of the covenant on a special grant (c), a prescriptive right accrues or begins to run from the time the house is built, and the windows put in, although it be not inhabited. *Vide Courtauld v. Legh*, L. R., 4 Ex. 126.

No right can be acquired for open ground, as decided in the case of *Roberts v. Macord*, 1 M. & R. 230, where it was held that "no right to have the light and air unobstructed could be acquired by prescription in respect of a timber yard and saw pit."

It is presumed that, following the decision in the case of *Tapling v. Jones*, the right entirely depends on the Statute; it would follow that uninterrupted user for twenty years would give a prescriptive right even to an extraordinary light (d). No right not to increase the light by reflection can be acquired (e); nor by increasing the size or enlarging ancient windows can a person acquire the right to the increased light under twenty years. (f)

The servient owner may erect an obstruction on his own land, but so as not to interfere with the ancient lights (g). See remarks of Pollock, B., in *Cawkwell v. Russell*, 26 L. J. Ex. 24.

(a) *Palmer v. Fletcher*, 1 Lev. 122; *Compton v. Richards*, 1 Price, 27; *Swanborough v. Coventry*, 9 Bing. 305; Goddard on Easements, 168.

(b) *Potts v. Smith*, L. R., 6 Eq. 311.

(c) *Leech v. Schweder*, L. R., 9 Chy. App. 463; 43 L. J., Chy. 487.

(d) *Hertz v. Union Bank of London*, 2 Giff. 686.

(e) *Lanfranchi v. Mackenzie*, L. R., 4 Eq. 421.

(f) *Cooper v. Hubbuck*, 30 Beav. 160; 31 L. J., Chy. 123.

(g) *Cooper v. Hubbuck*, 30 Beav. 160; *Tapling v. Jones*, 11 H. L. C. 290; *Greenslade v. Halliday*, 6 Bing. 379.

“Without interruption” means “without interruption by some reasonable means.” *Arkwright v. Gell*, 5 M. & W. 203.

As to the question of the right to flow of air, see *Webb v. Bird*, 10 C. B., N. S. 268; *Mounsey v. Ismay*, 3 H. & C. 486; also on page 209; but in *Bliss v. Hall*, 4 Bing. N. C. 183, it was held that the common law right to pure air remained until an adverse right to pollute it had been acquired by twenty years’ user; see also *Flight v. Thomas*, 10 A. & E. 590; *Crumpp v. Lambert*, 3 Eq. 409. Mr. Goddard says, p. 122: “These decisions and dicta tend to create uncertainty as to the meaning of the Prescription Act, but in no case has the point been so well considered as in *Webb v. Bird* and *Mounsey v. Ismay*. It is very probable, therefore, that if the question were fairly raised and argued, it would be held that neither a right to support nor a right to pollute air or create noise, to the annoyance of a neighbour, is an easement which can be acquired under the second section of the Prescription Act.”

With regard to light, the latest case in our courts is that of *Hall v. Evans*, 42 Q. B. 190.

Defendant, in 1855 or 1856, built a house on his lot adjoining the plaintiff’s, having three windows looking out upon the plaintiff’s land. In 1864 the defendant raised his house more than three feet, and none of the windows being more than three feet high, the position of each of them was entirely changed. *Held*, that he had acquired no right under the Statute C. S. U. C. cap. 88, s. 38 (s. 36 of the present Act), for that he had not enjoyed the access or use of the light *at the same place* for the statutory period.

Defendant claimed title by possession for ten years to a small strip of the plaintiff’s land, thirty-four inches in width, adjoining his own, having used it for the purpose of banking up his cellar. *Held*, that this claim was properly found against him, such possession being too uncertain and insufficient.

Cases cited on behalf of plaintiff: *Renshaw v. Bean*, 18 Q. B. 112; *Hutchinson v. Copestake*, 9 C. B., N. S. 863; *Heath v. Bucknall*, L. R., 8 Eq. 1; *Blanchard v. Bridges*, 4 A. & E. 176; *Brummell v. Wharin*, 12 Grant, 283; *Biggar v. Allan*, 15 Grant, 358. Gale on Easements, 5th Edit., 174, 587, 599.

In the States of New York, Massachusetts, Connecticut, Maryland, Pennsylvania and South Carolina, the doctrine of gaining a prescriptive right to light by mere length of enjoyment has been abandoned, as being unsuited to the wants and circumstances of the country. See Washburn on Easements, 498; *Powell v. Simons*, 13 Am. 629; *Guest v. Reynold*, 18 Am. 570; *Doyle v. Lord*, 21 Am. 629; Harrison, C. J., judgment in *Hall v. Evans*.

Here is a question for legislators who desire to benefit the country to consider. Is the present state of the law with regard to light suited to Ontario? Is it not better to make the owner of a house buy the adjoining lot than to compel the owner of the adjoining lot to put up an *ugly* obstruction against his neighbour's windows?

PRIVACY.

No action is maintainable for disturbing a man's privacy by windows built by defendant in his own house. *Turner v. Spooner*, 30 L. J., Chy. 803; *Chandler v. Thompson*, 3 Comp. 80.

Interruption of privacy was expressly held not to confer a right of action. *In re Penny v. The South Eastern Railway Company*, 7 E. & B. 660; 26 L. J., Q. B. 225.

See with regard to breaking a covenant that would have the effect of disturbing the privacy, *Lord Manners v. Johnson*, 1 Chy. D. 680.

Extent of prescriptive rights to light. "The Statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before the Statute was to have that amount of light

through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house, as a dwelling house, if it were a dwelling house; or for the beneficial use and occupation of the house, if it were a warehouse, a shop or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land, so as to obstruct the access of *sufficient* light and air to such an extent as to render the house substantially less comfortable and enjoyable.”—James, L. J., in *Kelk v. Pearson*, L. R. 6 Chy. App. 809; approved of by Lord Selborne, L. C., in the *City of London Brewery Company v. Tennant*, L. R., 9 Chy. App. 212; *Yates v. Jack*, L. R., 1 Chy. App. 295; 35 L. J., Chy. 539. “The right conferred (prescriptive right by Statute) is an absolute indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used.”—Cranworth, L. C.

By grant, the same extent as by prescription. *Kelk v. Pearson*, L. R., 6 Chy. App. 813. An old case of *Turner v. Spooner*, 4 Esp. 69, seems to hold that the servient owner could restrain the dominant owner to the amount of light that had been accustomed to go through his windows, even when that amount was curtailed by the construction of the dominant tenement itself; but the more modern case of *Turner v. Spooner*, 1 Dr. & Sm. 467, settles the question. There the dominant owner fitted up his windows without enlarging them, and took away the iron bars, and had them arranged so that they would open wide; and the servient owner immediately erected an obstruction resembling windows, within a few inches of the new windows, glazed with opaque dark-coloured glass, and prevented the additional light which the plaintiff would have had by his improvements. On a bill filed to restrain the erection of the glazed frame, it was held that the plaintiff had a right to improve his own dwelling without acquiring a new easement.

It has been the custom to couple together air and light when suing for obstruction, but this is manifestly improper,

as there is a great difference. See *The City of London Brewery Company v. Tennant*, L. R., 9 Chy. App. 218; 43 L. J., Chy. 457; also *Baxter v. Bower*, 44 L. J., Chy. 625, in which it was said that all the forms of injunctions inserted the word *air* as well as *light*, but that the former word ought not to be inserted unless it was specially directed; and James, L. J., said the Court never puts in the word *air* now unless it is really required.

Right of action for obstruction of light. *Bankart v. Houghton*, 27 Beav. 425.

One of the earliest cases for restraint of obstruction is *The Attorney-General v. Nichol*, 16 Ves. 338. Lord Eldon, C., said that the foundation of the jurisdiction of that court was that head of mischief alluded to by Lord Hardwicke, that sort of material injury to the comfort of the existence of those who dwell in the neighbouring house, requiring the application of a power to prevent, as well as remedy, an evil for which damages, more or less, would be given in an action at law.

Acquiescence will generally be presumed if a man stand by and see a building put up that will obstruct his light without taking steps to protect his interests; and the character of the structure will also be taken into consideration by the Court. *Davies v. Marshall*, 10 C. B., N. S. 697; *Baxter v. Bower*, 44 L. J., Chy. 625.

Light cannot be claimed as ancient against a lessor of a house. *Fox v. Purcell*, 3 Sm. & G. 242.

Sale of a house overlooking land of vendor gives an implied right of light to the purchaser, but only as to the windows therein at the time of the purchase. *Blanchard v. Bridges*, 4 A. & E. 176; 5 L. J., N. S., K. B. 78.

There is no justification for obstructing light, as it is a right acquired by prescription, and the dominant owner is entitled to the full amount of light flowing in the same way as when the right began to be acquired. *Yates v. Jack*, L. R., 1 Chy. App. 295; *Martin v. Headon*, L. R., 2 Eq.

425; *Dent v. Auction Mart Company*, L. R., 2 Eq. 238; *Senior v. Pawson*, L. R., 3 Eq. 330; *Straight v. Burn*, L. R., 5 Chy. App. 163; *Dyers' Company v. King*, L. R., 9 Eq. 438; *Baxter v. Bower*, 44 L. J., Chy. 625.

The position of the obstruction of the building has nothing to do with the question, which is the effect; although in cases of buildings, the position of which is oblique to the obstructed windows, it may require more evidence. *Attorney-General v. Nichol*, 16 Ves. 342; *The City of London Brewery Company v. Tennant*, L. R., 9 Chy. App. 220; *Clarke v. Clarke*, L. R., 1 Chy. App. 16.

We have before alluded to the question whether the enlargement of ancient windows, or putting in other windows, would take away the ancient right acquired by prescription, and allow the servient owner to build where before he could not. The cases have been conflicting. In *Renshaw v. Bean*, 18 Q. B. 112, the Court held in favour of defendant. This was followed by *Hutchison v. Copestake*, 9 C. B., N. S. 863. Then came the cases of *Binckes v. Pash*, 11 C. B., N. S. 324; and *Jones v. Tapling*, 11 C. B., N. S. 283; 12 C. B., N. S. 826. This latter case was taken to the House of Lords (a), and has already been noticed.

The effect of the decision was that the ancient right (prescriptive) remained, although the buildings might be altered and the windows enlarged (b). We insert a portion of the judgment: "Suppose the owner of a dwelling-house with a window, to which an absolute and indefeasible right to a certain access of light belonged, opens two other windows, one on each side of the old window, does the indefeasible right become thereby defeasible? By opening the new windows he does no injury or wrong in the eye of the law to his neighbour, who is at liberty to build up against them, so far as he possesses the right of building on his

(a) 11 H. L. C. 290.

(b) Goddard on Easements, 307; 2nd Edit.

land; but it must be remembered that he possesses no right of building so as to obstruct the ancient window, for to that extent his right of building is gone by the indefeasible right which the Statute has conferred." This is the leading case before the highest tribunal, yet, since the decision in *Tapling v. Jones*, several cases have occurred in which the Judges in the Court of Chancery have doubted the soundness of the reasoning.

In *Lanfranchi v. Mackenzie*, L. R., 4 Eq. 426; 36 L. J., Chy. 522, Vice-Chancellor Malins said he did not understand the Prescription Act to have made any difference in the principle on which rights to light are acquired by prescription, and that he only read the Statute as meaning that there was no absolute period for acquisition of a right to light before the statute, but that now the period is fixed at twenty years, and that all the cases since the Act was passed had been decided on the ancient principle of law.

In *Heath v. Bucknall*, L. R., 8 Eq. 1, Lord Romilly held that the alteration of ancient windows took away from plaintiff the right to an injunction in Chancery, although he might get whatever damages there were at law; but in *Straight v. Burn*, L. R., 5 Chy. App. 166, Lord Justice Giffard differed from him, and in *Aynesley v. Glover*, L. R., 10 Chy. App. 283, it was held that the Prescription Act did not take away any of the modes of claiming easements, *including rights to light*, which existed before the Statute.

If the obstruction be temporary, the occupier of the house may alone sue; if permanent and would affect the property, the reversioner also. *Metropolitan Association v. Petch*, 5 C. B., N. S. 504; *Wilson v. Townsend*, 1 Dr. & Sm. 324.

Limited interest in house, limited restraint of right of light. *Simper v. Foley*, 3 John. & H. 555. If a tenant obstruct the light, an action may be obtained against him; but if the building be erected before the tenancy, the tenant

cannot remove it, for that would be committing waste. *Arnold v. Jefferson*, Holt, 498; *Rosewell v. Prior*, 2 Salk. 460.

It is not every case which will receive the attention of the Courts either in the way of damages or for an injunction. The damage to the light must be substantial. In the case of *Back v. Stacey*, 2 C. & P. 377, Justice Best says: "In order to give a right of action and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and (or) to prevent the plaintiff (a grocer) from carrying on his accustomed business." *Vide* also *Hertz v. Union Bank of London*, 2 Giff. 686; *Dent v. The Auction Mart Company*, L. R., 2 Eq. 238; *The Attorney-General v. Nichol*, 16 Ves. 338; *Jackson v. Duke of Newcastle*, 33 L. J., Chy. 698; *Parker v. Smith*, 5 C. & P. 438; *Wills v. Ody*, 7 C. & P. 410; *Pringle v. Wernham*, 7 C. & P. 377; *Archedeckne v. Kelk*, 2 Giff. 683; *Robson v. Whittingham*, L. R., 1 Chy. App. 442; *Beadel v. Perry*, L. R., 3 Eq. 465; *Morris v. Lessees of Lord Berkeley*, 2 Ves. 452.

Substantial injury must be proved even under a covenant for quiet enjoyment of the light. *Leech v. Schweder*, L. R., 9 Chy. App. 463.

There is no hard and fast rule—although at one time it was attempted—that if the light were prevented from falling at a greater angle than forty-five degrees, there was substantial injury. *Beadel v. Perry*, L. R., 3 Eq. 446.

This attempt gave rise to much argument; but in *The City of London Brewery Company v. Tennant*, L. R., 9 Chy. App. 212, Lord Selborne, C., said there is no positive rule of law upon the subject, although it would be matter of evidence; and as the Metropolitan Building Act is framed on the principle that the height of a building on the opposite side of the street should not exceed the breadth of the street, that would be good evidence. The application must be founded on the present existing injuries, and future possi-

bilities could not be speculated upon by the Court. *Jackson v. The Duke of Newcastle*, 33 L. J., Chy. 698.

In *Aynesley v. Glover*, L. R., 18 Eq. 544, Jessel, M. R., expressed his opinion that the above decision was wrong, and in conflict with *Yates v. Jack*, L. R., 1 Chy. App. 295.

Taking the law into your own hands and removing the obstruction has been held to be legal, though it is dangerous. *Vide Hyde v. Graham*, 1 H. & C. 599; *Rex v. Rosewell*, 2 Salk. 459; *Arnold v. Jefferson*, Holt, 498.

In order to do away with the prescriptive right acquired by length of time, there must be an agreement or consent in writing, and "payment of rent or other acknowledgment therefore no longer keeps open the right of the adjoining owner to obstruct lights;" and in the case of *The Plasterers' Company v. The Parish Clerks' Company* (a), it was held, "that although the plaintiffs had paid the agreed acknowledgment for nearly 200 years, the right of the adjoining owner to build against them was taken away by the Act."

"The twenty years' enjoyment which under s. 3 of 2 & 3 Will. IV. cap. 71, gives an absolute and indefeasible right to the access of light, need not be an enjoyment in fact 'without interruption' for the period mentioned, but an enjoyment without *such* an interruption as is contemplated by s. 4, viz., 'an interruption submitted to or acquiesced in by the party interrupted for one year' after notice." *Glover v. Coleman*, 11 C. P. 275.

"And in order to negative submission to or acquiescence in the interruption, it is not necessary that the party interrupted shall have brought an action or suit, or taken any active steps to remove the obstruction; it is enough to shew that he has in a reasonable manner communicated to the party causing the interruption that he does not really submit to or acquiesce in it. *Ibid.*

(a) 6 Ex. 630; 20 L. J., Chy. Ex. 362.

“Where, therefore, the plaintiff had for more than twenty years enjoyed the access of light to his workshop, through a window against which the defendant had, about fourteen months before action brought, erected a permanent building which obstructed it, and the plaintiff had taken no active measures to cause the obstruction to be removed, but had several times, himself or by his tenant, complained of and protested against it; *held*, that it was a question proper to be left to the jury whether or not there had been such a submission to or acquiescence in the interruption of the enjoyment as to deprive the plaintiff of the right to the light. *Seemle*, that the same sort of evidence of user or enjoyment need not be given in the case of a light as in the case of a claim of a right of way.” *Ibid*.

“An agreement to grant A. a lease, in a form set out in a schedule, of property in the city, as soon as the house then in course of erection by A. on the property should be completed, contained a proviso that nothing therein contained should give A. a right to any easement which did not belong to the premises agreed to be demised as they then existed, nor to any right of light and air derived from over the houses opposite (which belonged to the lessors). The lease subsequently granted was of the land together with the house erected thereon, and all lights, easements, and appurtenances thereto belonging. In accordance with the scheduled form, *held*, that the grant by the lease of lights and easements was controlled by the antecedent agreement, which was to be read as part of the lease; and that A. was not entitled to restrain the lessees of the opposite houses from building so as to obstruct the access of light and air to his premises from over such houses.” *Salaman v. Glover*, 15 Eq. C. 436.

“Neither the enlargement of ancient windows nor the construction of new windows in their immediate vicinity will affect the right of the owner to protection for his ancient lights.” *Aynsley v. Glover*, 11 Eq. C. 521; affirmed, 12 s. c. 726.

“Where it appeared that the building complained of as seriously obstructing ancient lights was nearly completed when the bill for an injunction was filed, *held*, that a mandatory injunction would not be granted to restrain the completion and continuance of the building, but the Court directed an inquiry as to damages, though not prayed for in the bill.” *Stanley v. Shrewsbury*, 13 Eq. C. 546.

37. Each of the respective periods of years in the last three preceding sections mentioned shall be deemed and taken to be the period *next before some suit or action*, wherein the claim or matter to which such period may relate was or is brought into question; and no act or other matter shall be deemed an interruption within the meaning of the said three sections, unless the same has been submitted to or acquiesced in for *one* year after the party interrupted has had notice thereof, and of the person making or authorizing the same to be made. C. S. U. C. cap. 88, s. 39.

This section is taken from 10 & 11 Vic. cap. 5, s. 4, which was taken from 2 & 3 Will. IV. cap. 71, s. 4.

We have before alluded to the decisions, where it was held that the time should be counted up to the time when the action was brought, not up to the time the trespass was committed.

Parke, B., in *Ward v. Robins*, 15 M. & W. 237, says: “Such enjoyment, in order to give a right under that Statute, must be up to the time of the commencement of the suit, not up to the time of the act complained of; and consequently, an enjoyment for twenty years or more before that act gives only what may be termed an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of the suit.” *Vide* also *Wright v. Williams*, 1 M. & W. 77; *Richards v. Fry*, 7 A. & E. 698.

“Some suit or action.” A question arose as follows: Whether the enjoyment which is to confer the right must be an enjoyment for twenty years next before the suit or action in which the claim is set up, or whether it is enough that the enjoyment has been had for twenty years next

before some other action or suit. *Cooper v. Hubbuck*, 12 C. B., N. S. 461. *Held*, Williams, J., dissenting, that the twenty years' enjoyment of the access and use of light to a dwelling house, &c., under the 3rd and 4th section of the Prescription Act, 2 & 3 Will. IV. cap. 71, is to be taken to be the period next before some action or suit wherein the claim shall have been brought in question. Willes, J., there says: "The effect, therefore, is that immediately upon the bringing of such suit or action, the enjoyment, if within the previous sections as to length and otherwise, shall ripen into a right. That becomes necessary immediately upon the bringing of the first suit or action, wherein the claim or matter shall have been or shall be brought in question. If the Statute did not then come into operation, there would be a right without a remedy. If it does, as I think it will be admitted it does, then come into operation, what is its effect? I answer, the creation of a right, not a mere excuse or temporary shift or continuance for the purpose of that suit." See *supra*.

"*Next before* some suit or action." With reference to this, it has been decided that the Statute intends that actual user must have been shewn to have continued to within one year of the commencement of a suit or action. In *Parker v. Mitchell*, 11 A. & E. 788, evidence was given of a way from a period of fifty years till within four or five years before the commencement of the action, and it was held that this evidence was not sufficient to establish an easement. Lord Denham expressed an opinion that absence of evidence of user for two days before the commencement of the action would not prevent the acquisition of an easement. *Lowe v. Carpenter*, 6 Ex. 825, user for fourteen months held insufficient (a); *Haley v. Ennis*, 10 Q. B. 404. See also *Glover v. Coleman*, L. R., 10 C. P. 108.

Ladyman v. Grave, L. R., 6 Chy. App. 768; *Carr v. Foster*, 3 Q. B. 581. These cases indicate that user is

(a) Goddard on Easements, 129.

sufficient for the acquisition of a prescriptive right, even though there were a period of non-user in the middle, *provided the non-user* was not in consequence of the adverse act of the servient owner, so as to constitute an interruption.

Mere non-user will not of itself constitute sufficient defence to a claim for a prescriptive right: to have that effect, it must be coupled with some act indicative of abandonment. (a)

If the user be interrupted in one part, the prescriptive right only fails as to that part. *Davis v. Williams*, 16 Q. B. 546; 20 L. J., Q. B. 330.

Trifling interruptions or alterations in the course of a stream will not prevent prescription. *Hall v. Swift*, 4 Bing. N. C. 381.

There is constructive enjoyment of the easement, even when there is non-user by agreement, and that will not prevent prescription. (b)

In *Wright v. Williams*, 1 M. & W. 77, it was determined that the Statute intended to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and to legalize every act done in the exercise of the right during their continuance.

The rules for computation of prescription periods apply only to cases of easements claimed under the Act. To establish an easement claimed by prescription at common law, it is not essential to produce evidence of user within the last year before action. *Darling v. Clue*, 4 F. & F. 329.

ACQUIESCENCE.

In 1861, while defendant was building a tannery on land adjoining the plaintiff's premises, the plaintiff encouraged defendant to proceed. The business was commenced the

(a) *Moore v. Rawson*, 3 B. & C. 332; *Stokoe v. Singers*, 8 E. & B. 31; 26 L. J., Q. B. 257; *Regina v. Chorley*, 12 Q. B. 515.

(b) *Payne v. Shedden*, 1 M. & R. 382; *Reignolds v. Edwards*, Willes, 282; *Carr v. Foster*, 3 Q. B. 585.

same year. In 1863 additions were made to the buildings with the plaintiff's knowledge and acquiescence; and the plaintiff made no complaint about the business until 1868, though all this time it had been carried on, and the plaintiff had been residing on the premises adjoining. *Held* (affirming the decree of the Court below), that by his conduct he had debarred himself from relief in equity on the ground of a tannery being a nuisance. *Heenan v. Dewar*, 18 Chy. 438; s. c. 17 Chy. 638.

With regard to acquiescence, a good case to notice is *Lindsay Petroleum Oil Company v. Hurd*, 17 Chy. App. 115. On Appeal to the Privy Council (s. c., 16 Chy. 147), it was held in accordance with the Court below, L. R., 5 P. C. 221.

Nature of licenses is clearly explained in *Wood v. Ledbitter*, 13 M. & W. 838, where it is held that mere licenses may be given by deed as well as by parol. As to acquiescence, see *Davies v. Marshall*, 10 C. B., N. S. 697; *Rochdale Canal Company v. King*, 2 Sim., N. S. 78.

The latter case was an application by Rochdale Canal Company to prevent the defendant from taking water from their canal for the purposes of generating steam, when the Canal Company, at the time of the building of the mill, had assisted in laying the pipes to get the water. *Held*, sufficient acquiescence, so that injunction was not obtained.

Licenses may be acquired by grant. *Hewitt v. Isham*, 21 L. J., Ex. 35.

Some cases decided in our own courts may be mentioned. *Ingalls et al. v. Reid*, 15 C. P. 490. An intending purchaser of devised lands, doubting whether a provision made by the testator was in lieu of dower, asked the widow whether she had or claimed dower. *Held*, that even if her answer was in the negative, it afforded no ground for the purchaser applying to this Court to restrain her action for

dower, brought on her being advised that under the will she was not put to her election. *Fairweather v. Archibald*, 15 Chy. 255.

Where for ten years a wife concealed from the public her relation to her husband, and allowed him to live with another woman as his wife under an assumed name, the real wife living in the neighbourhood and receiving from them her own support, it was held that she was precluded from claiming dower out of land purchased during this period in the husband's name, and afterwards sold by him and his supposed wife to a purchaser who bought in good faith, and without any notice of the real relationship of the parties. *Haig v. Gordon*, 17 Chy. 509.

Where the owner of an estate stands by and allows a third person to appear as the owner, and to enter into a contract as such, the owner will be decreed specifically to perform such contract. *Davis v. Snyder*, 1 Chy. 134.

By a deed duly executed and registered, lands with a water frontage were vested in a man for life, remainder to his son in fee. The deed contained an agreement or stipulation that neither party should be at liberty to dispose of or encumber the property in any way without the consent of the other. The father, with the knowledge but without the consent of the son, sold a portion of the water frontage, and the purchaser, with the knowledge of the son, improved thereon. After the death of the father, the son sold and conveyed the lands, including the water frontage, which had been conveyed by the father, on the ground of acquiescence by the son, and that W. had notice of the plaintiff's interest. *Held*, that the registration of the deed under which the father and son claimed was actual notice of the son's title, and that his acquiescence or lying by could not affect his interest, but at most could only be construed into a consent by him to the sale by the father of his own interest; and *semble*, that under the circumstances that even if registration were not actual notice, the acquiescence

would not bind his reversionary interest; and that even if the plaintiff had acquired any equitable interest arising out of such acquiescence, he could not enforce it against W. without proving actual notice to him of such equitable interest. *Bell v. Walker*, 20 Chy. 558.

In *Craig v. Craig*, 24 Chy. 575, Proudfoot, V. C., says: "Equity interposes to prevent a person who has acquiesced in the expenditure of money, or in the doing of some other act, on the supposition that a right to an easement was acknowledged, from making use of his legal title to interfere with the enjoyment of it."

In *The Duke of Devonshire v. Elgin*, 14 Beav. 530, the defendant had consented to plaintiff making a water-course through his land upon being paid a "proper and reasonable sum." The water-course was made, but no grant was executed, and no sum arranged. After nine years' user the defendant stopped it up, but he was restrained by a perpetual injunction from interfering with it, and a reference was made to the Master to fix a proper compensation. See also *Powell v. Thomas*, 6 Hare, 300; *Laird v. Birkenhead Railway Company*, John. 500; *Duke of Beaufort v. Patrick*, 17 Beav. 60; *Bankart v. Houghton*, 27 Beav. 425; *Somerset Canal Company v. Harcourt*, 24 Beav. 571; *Moreland v. Richardson*, 22 Beav. 596.

38. In all actions upon the case and other pleadings wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same is denied, all and every the matters in the four next preceding sections of this Act mentioned and provided, which are applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein it would formerly have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, *as of right*, by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as are applicable to the case, and without claiming in the name or right of the owner of the fee, as

was usually done ; and if the other party intends to rely on any proviso, exception, incapacity, disability, contract, agreement or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation. C. S. U. C. cap. 88. s. 40.

This section is taken from 10 & 11 Vic. cap. 5, s. 5, which was taken from 2 & 3 Will. IV. cap. 71, s. 5.

Under the common law, the owner of land in fee can alone claim an easement by prescription. Other persons must prescribe through him, and shew the derivation of their title from him. (*a*)

A tenant for years must prescribe through his landlord (*b*). But the present Statute (*c*) altered this, and says: "In all pleadings to actions of trespass, and in all other pleadings wherein formerly it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the *occupiers* of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done." The words of the Act do not enable the occupier to acquire the easement for himself; it is for the benefit of the dominant tenement, and goes with it.

We shall notice several cases in our own and the English courts.

In a case for overflowing the plaintiff's land, the defendant pleaded the enjoyment of a right for twenty years; the replication simply traversed the enjoyment. *Held*, that the plaintiff could not give in evidence a life estate outstanding as tenant by courtesy, but must, by 10 & 11 Vic. cap. 5, s. 5,

(*a*) *Holback v. Warner*, Cro. Jac. 665; *Staples v. Heydon*, 2 Ld. Raym. 922; *Smith v. Morris*, Fort. 340.

(*b*) *Large v. Pitt*, Peake Ad. Ca. 152; *Dawny v. Cashford*, Carth. 432.

(*c*) Goddard on Easements, 12.

reply to that fact specially. *Stuart v. Spence*, 10 Q. B. 486. See also remarks of Robinson, C. J., in *McKechnie et al. v. McKeyes*, 10 Q. B. 49.

To an action in a case for penning back water so as to overflow the plaintiff's land, a plea of prescription was held bad: 1st, For claiming the right by user for twenty years before action brought instead of *next* before; 2nd, As claiming only a right to erect a dam of a certain height without applying such defence to the injury complained of, or admitting the injury. *Haley v. Ennis et al.*, 10 Q. B. 404.

Ward v. Robins, 15 M. & W. 237, 239; 1 C. M. & R. 211; *Wright v. Williams*, 1 M. & W. 77; *Richards v. Fry*, 3 Nev. & P. 67. These cases all hold that in the construction of the Prescription Act the twenty years' continuous enjoyment is down to the *commencement* of the action, not to the time the trespass was committed. Parke, B., in *Ward v. Robins*, says: "This apparent absurdity, arising from a strict construction of the Act, has already been fully considered by this Court in the case of *Wright v. Williams*, and the literal interpretation adhered to, the Court intimating its opinion that the mischief of such a construction was rather apparent than real; and the decision in that case was fully approved of and acted upon by the Court of Queen's Bench in the case of *Richards v. Fry*." See also the remarks of Robinson, C. J., in *McKechnie et al. v. McKeyes*, 9 Q. B. 566.

In *Buel v. Ford*, 6 C. P. 206, the Court followed the decision in *Haley v. Ennis* and *Richards v. Fry*, and held a plea *bad* for not stating that user had been twenty years next before the commencement of the action. "The next point to be remarked is that the periods are to be *next* before some suit or action." This was decided in *Cooper v. Hubback*, 12 C. B., N. S. 456; 31 L. J. C. P. 323; that it was sufficient if the period preceded some former suit or action, and not the particular action.

Smith v. Walbridge, 6 C. P. 324, which was an action for throwing the water back upon and obstructing the plaintiff's mill by the erection of a mill lower down, deserves attention. The pleas are: "That he, the defendant, and all the occupiers for the time being of the said mill and premises, with the appurtenances of the defendant, have had and each of them hath had, and actually enjoyed *as of right* and without interruption, for the full period of twenty years next before the commencement of this suit, a certain right, benefit and easement for himself and themselves, of erecting and placing, &c., of the height of eight feet; wherefore," &c.

Draper, C. J., says: "In *Tickle v. Brown*, 4 A. & E. 369, the Court held that the enjoyment *as of right*, spoken of in the Statute, meant an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right. Construing the terms 'enjoyed as of right,' used in the plea, in this manner, the objection is fully answered. It was objected also that the pleas should have contained a distinct averment that the obstruction complained of was actual, occasioned and erected during the period of twenty years." Chitty's Pleadings, 7th Edit. by Greening, Vol. III. p. 271, referred to. Draper, C. J., "Every material statement contained in the form is to be found in these pleas." The pleas were sustained, and the practice and pleadings in these cases thus clearly indicated by judicial authority.

We refer also to *Bechtel v. Street*, 20 Q. B. 15, which was a case for backing up the water on plaintiff's land. Plea was held good. Robinson, C. J., at p. 17, says: "The important question of fact is not how high the dam was for twenty years, but how high the water has been backed up on the plaintiff's land during that time, and I confess I should have expected in any approved precedent of a plea of prescription, to find that point more clearly brought out

than it is in the precedent in Mr. Chitty's excellent work. But we are not disposed to treat the precedent as one that is not safe to follow; and taking it to be sufficient, then the question is, whether the plea now before us is not in substance and effect the same, though it does not specify the height of the dam as the precedent in Chitty does. It may, we think, be held that it is substantially the same in its statement, for what it states is that the defendant has *enjoyed*, which has been held equivalent to saying that he has exercised for twenty years the right and privilege of keeping up the same dam as that which forms the obstruction, and occasions the injury complained of. If that be so, it is of no consequence what the height of the dam was and is—the fact of identity is the material thing."

Tucker v. Paren, 7 C. P. 269, is a case which shews the necessity of care being taken in drawing the pleadings. This was a case by the owner of a mill below the mill of another on the same stream, and the claim was for damages in diverting the water. The plaintiff claimed as owner of the mill, which had only been built eighteen years. *Held*, that he should have founded his right on the possession of the land. Draper, C. J., says: "It struck me at the trial that, as it was only a partial interference with the *natural* flow of the stream that was complained of, the plaintiff might sustain his right to that extent on the possession of the mill as well as of the land on which it stood. But the case cited of *Frankum v. Lord Falmouth*, 2 A. & E. 452, clearly establishes the contrary, and shews that plaintiff should under the circumstances have founded his claim to the use of the water on the possession of the land. The right to have a stream running in its natural course is *ex jure naturæ* (*Dickinson v. Canal Company*, 7 Ex. 299); and each riparian proprietor is entitled, not to the property in the flowing water, but the usufruct of the stream, for all reasonable purposes—to drink, to water his cattle, or to turn his mills, according to the nature and situation of the stream;

and where an injury is done to any right, an actual perceptible damage need not be proved in order to maintain an action. *Embrey v. Owen*, 6 Ex. 353. But *still the right must be claimed correctly*, and the plaintiff can only recover on the right set forth in the declaration." *Vide, Insole v. James*, Hurst & N. 243.

On penning back water, acquiescence, and pleading on demurrer, see *Dean v. Gray*, 22 C. P. 203; *Williams v. Earl of Jersey*, Cr. & Ph. 97; *Davies v. Marshall*, 10 C. B., N. S. 697; *Hendry v. English*, 18 Grant, 119, where the doctrine of acquiescence was fully discussed.

Tucker v. Paren, 8 C. P. 63. In an action brought to try the right to water, the defendant by his plea admitted that he had raised his dam to a greater height than he was legally entitled to do, but denied the consequences arising from such act. Upon demurrer, *held* good. *Kerr v. Beav-inger*, 2 Q. B. 340.

With regard to this section, the cases *Bright v. Walker*, 2 Cr. M. & R. 211, and *Pye v. Mumford*, 11 Q. B. 666, are leading cases.

In the case of *Welcome v. Upton*, 5 M. & W. 398, 6 M. & W. 536, Parke, B., says: "The plea is good. It claims a prescriptive right in Brereton and his ancestors, and in his and their heirs and assigns, of the sole and several pasturage in the close in question. It is laid down in Co. Litt. 122, that a party may prescribe to take the sole and several herbage, and although this was doubted in *North v. Cox*, 1 Lev. 253, it was afterwards established as law by the cases of *Hoskins v. Robins*, Pollexf. 13; *Potter v. North*, 1 Ventr. 385." The head note in this case (a) is as follows: "To an action of trespass for taking the plaintiff's cattle in an open field (called 'P. & G.' field) and impounding them, the defendant pleaded first, that T. B. and his ancestors had been immemorially used and accustomed to have, for themselves, their heirs and assigns, the sole and several pasturage in 217

(a) *Welcome v. Upton*, 6 M. & W. 536.

acres of 'P. & G.' field in gross, for all his and their cattle, from the 4th of September to the 5th of April; that T. B., in 1755, by indenture, granted the said pasturage to S. B., his heirs and assigns forever; that J. B. (who claimed by descent from S. B.) in 1836 demised the said pasturage to the defendant, who seized the plaintiff's cattle because they were depasturing on the said 217 acres. The second plea alleged a right of sole pasturage in gross for thirty years before the commencement of the suit (under the Statute 2 & 3 Will. IV. cap. 71, s. 2) in J. B. and his ancestors, and a demise from him to the defendant, concluding as in the first plea. The replication traversed the right of T. B. as alleged in the first plea, and the enjoyment of J. B. as of right without interruption for thirty years, as alleged in the second.

"It appeared in evidence that within the last twenty years encroachments had been made by buildings and inclosures on the 217 acres on which the alleged trespass was committed. *Held*, that these interruptions being so recent did not disprove the right of T. B. to the pasturage in 1755, as alleged in the first plea; and that not having been made on that part of the land where the plaintiff's cattle were depasturing, they were not conclusive evidence of an interruption of the enjoyment of that part by J. B., as alleged in the second plea."

39. In the several cases mentioned in and provided for by this Act, of claims to lights, ways, water-courses or other easements, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim. C. S. U. C. cap. 88, s. 41.

This section is taken from 10 & 11 Vic. cap. 1, s. 6, which was taken from 2 & 3 Will. IV. cap. 71, s. 6.

The case of *Carr v. Foster*, 3 Q. B. 581, deserves attention. "The enjoyment of the right was proved to have continued

for nearly forty years before the commencement of the action—the Act, in the case of commons, requiring enjoyment for thirty years. It appeared, however, that about eighteen years before the action, the owner of the dominant tenement, having no cattle, made no use of the right for a period of two years. It was urged in opposition to the claim, that the Act required *actual* enjoyment during the whole period, which was not proved, and that by reason of the sixth section, no presumption of enjoyment during the two years could be made; but it was held that the evidence was sufficient to support the right, Lord Denman, C. J., in his judgment saying that ‘Section 6 enacts that no presumption shall be made in favour of any claim, on proof of the right having been exercised for a less period than that prescribed by the Act in the particular case. But that provision is meant only to encounter presumptions from an exercise of the right during such an imperfect period that it was exercised in olden times. The effect of the clause is that a claimant proving enjoyment for less than the specified time, shall not, on that ground, carry back his right to a period before that which his proof extends to. But this does not affect the mode of proof, and where actual enjoyment is shewn before and after the period of intermission, it may be inferred from that evidence that the right continued during the whole time.’ From the case of *Lawson v. Langley*, 4 A. & E. 890, 6 L. J., N. S., K. B. 271, it may be inferred that the sixth section of the Act would not preclude a jury from presuming user at the commencement of the prescriptive period, if evidence were given of user a little before, and again after the prescriptive period had begun to run.” (a)

This section relates exclusively to the cases of easements claimed under the Act. In *Bright v. Walker*, 1 C. M. & R. 222, Parke, B., says: “Of course, nothing that has been said by the Court, and certainly nothing in the Statute, will

(a) Goddard on Easements, 131.

prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or, upon proof of its loss, by secondary evidence, nor prevent the jury from taking the possession into consideration, with *other circumstances*, as evidence of a grant which they may still find to have been made if they are satisfied that it was *made in point of fact*." Lord Westbury's *dictum*, in *Hanmer v. Chance*, 34 L. J., Chy. 416, is to be noticed. Mr. Goddard thus sums up the conclusion to be derived from the decisions: "If an easement is claimed under the Prescription Act simply, no presumption of a grant, which every one knows never existed, may be made unless evidence is given of user for the full period required by the Act; but that if circumstances exist from which, coupled with a certain amount of user, it may be reasonably presumed that a grant *actually was made*, the Act does not forbid a presumption of such a grant having been made merely because the user by itself would have been insufficient to satisfy the Statute. In such a case the title to the easement is not prescriptive at all, but depends upon the actual grant."

This section does not embrace the whole of s. 6 in the Act 10 & 11 Vic. cap. 5, as s. 40 of this Act, which will be noted hereafter, is part of s. 6 in the former Act. But the present arrangement follows 2 & 3 Will. IV. cap. 71.

DISABILITIES AND EXCEPTIONS.

40. The time during which any person otherwise capable of resisting any claim to any of the matters mentioned in the *thirty-fourth* to the *thirty-ninth* sections of this Act, is an infant, idiot, *non compos mentis*, or *tenant for life*, or during which any action or suit has been pending, and which has been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the period in said sections mentioned, except only in cases where the right or claim is thereby declared to be absolute and indefeasible. C. S. U. C. cap. 88, s. 42.

This section is taken from the latter part of s. 6, in 10 & 11 Vic. cap. 5, which was s. 7 of 2 & 3 Will. IV. cap. 71.

It will be noticed that this section does not apply to a tenancy for years, although s. 41 does.

Coleridge, J., in *Palk v. Skinner*, 18 Q. B. 568; s. c. 22 L. J., Q. B. 27, says: "Putting out of consideration ss. 7 & 8, there was clearly evidence for the jury of a twenty years' user *as of right* before the commencement of the action. That being so, we must look at ss. 7 & 8 to see whether that period of twenty years is to be shortened by excluding the period during which the tenancy for years existed. Now, s. 7 applies in terms to a twenty years' enjoyment for the purpose, not of defeating the right, but of excluding certain periods from the computation of the twenty years. But a tenancy for years is not one of those periods, although a life tenancy is. Then s. 8 (41) does exclude a tenancy for years, but excludes it only *from the computation of a forty years' enjoyment*. There being one section applicable to a twenty years' enjoyment, and another expressly confined to a forty years' enjoyment, it would be unreasonable to import the latter into the former, and make s. 8 (41) apply to a twenty years' enjoyment also."

41. Where any land or water upon, over or from which *any such way or other easement, water-course or run of water* has been enjoyed or derived, or has been held under or by virtue of any term of life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter, as herein last before mentioned, during the continuance of such term shall be excluded in the computation of the said period of forty years, in case the claim is, within three years next after the end, or sooner determination of such term, resisted by any person entitled to any reversion expectant on the determination thereof. C. S. U. C. cap. 88, s. 43.

There is a material difference between this section and s. 7 of 10 & 11 Vic. cap. 5, and also the English section. In the English section we have the peculiar words "any such way or other convenient water-course, or use of water;" in 10 & 11 Vic. we have "any such way or other convenient water-course, or run of water." But our present section was altered at the time of the consolidation of the Statutes.

“The seventh (40) section of the Act appears to be at variance with the *fourth* (37). In the latter the period is required to be next before some suit or action, but if a disability intervenes, and the time during its continuance is to be excluded in computing the period, it may happen that a small portion of the prescriptive period only can be proved to have been *next before the action*. This point arose in the case of *Clayton v. Corby*, 2 Q. B. 813, 11 L. J., Q. B. 239, which was an action for trespass in answer to which a prescriptive right to dig clay was set up, claimed under the first section of the Act: the replication alleged the intervention of a life estate in the servient tenement, and the question was whether evidence of user for twenty-five years before the creation of the life estate, during the life estate, and for six years after the life estate continuously down to the commencement of the action, was sufficient to establish the right. It was held that it was, for that the fourth and the seventh sections ought to be read together, and that the period is required to be thirty years next before action, *excluding*, in the computation of those thirty years, any tenancy for life, and that the setting up of a life tenancy obliges a claimant to shew thirty years’ enjoyment, *either wholly before the tenancy for life, if it be still subsisting at the commencement of the suit, or partly before and partly after, if it be ended.*”

The user, to satisfy the Statute, must be continuous; and it may be urged against the continuity of the enjoyment, that if a tenancy for life or years or a period of disability intervenes, the time during the continuance of which is excluded in the computation, the enjoyment ceases to be continuous.

But this is not so; for the effect of the seventh and eighth (40, 41) sections is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment by so long a time as the tenancy or disability continues. (a)

(a) *Onley v. Gardiner*, 4 M. & W. 496; 8 L. J., N. S. Ex. 102; *Goddard on Easements*, 135.

We refer, in *Clayton v. Corby*, 2 Q. B. 813, to argument of counsel, B. Andrews and Gunning for defendant, in support of the rule: "The Court held, in *Richards v. Fry*, 7 A. & E. 698, that the correct mode of pleading a thirty years' enjoyment was to follow the words of the Statute in s. 4, and allege a user for thirty years next before the commencement of the suit. But to hold that those words necessarily meant a period immediately preceding would defeat the provisions of ss. 7 & 8. The effect of s. 7 is in reckoning the years next before the commencement of the suit; those during which a life estate subsisted must be considered as if struck out, and this is consistent with *Onley v. Gardiner*. [COLERIDGE, J.—It is not necessary for your case to treat the intervening years as a blank for all purposes. Suppose during the tenancy for life some exercise of the alleged right commenced, and the tenant brought an action and obtained judgment, and the user then ceased for a time; would that not be an effectual interruption? Or do you say that the tenant for life cannot protect the estate against such an assertion of right by interrupting it.] It is difficult to say how such an interruption could become available in pleading. [COLERIDGE, J.—It is sufficient for you to say that the years of the tenancy for life cannot be reckoned for the purposes of making title.]"

A question arose in *Bright v. Walker*, 1 C. M. & R. 211, 3 L. J., N. S. Ex. 250, on account of a few words which fell from Parke, B., whether terms of life and for years ought not to be excluded under this section (41) of the Act in the computation of twenty as well as of forty years, although the period of forty years is alone mentioned in that section of the Act.

This question was fully argued in *Palk v. Skinner*, 18 Q. B. 572, where it was pointed out that ss. 7 & 8 refer to entirely different states of circumstances—s. 7 referring to the twenty years' enjoyment spoken of in s. 2 (35), and s. 8 (41 of the present Statute) to a forty years' enjoyment, to

be construed strictly in accordance with the words of the Statute. Lord Campbell there said: "The period during which the land over which the right of way is claimed has been leased, for a term exceeding three years, is not, under this section, to be excluded from the computation of a twenty years' enjoyment, though it is no doubt to be excluded from a computation of an enjoyment for forty years. Section 7 excludes certain times, including that of a tenancy for life, from the computation of the 'periods' thereinbefore 'mentioned,' and a twenty years' enjoyment is one of those periods. But s. 8 (41) provides for the exclusion of certain other times, among which is a tenancy of more than three years, *not from the periods thereinbefore mentioned, but from one particular period only*, EXPRESSLY MENTIONED, namely, that of an enjoyment for forty years. It is clear then that it was not intended to exclude them from the computation of an enjoyment for twenty years. Great reliance was placed on *Bright v. Walker*; but on examination into that case, it appears that there was no necessity for the Court to give any opinion as to the effect of s. 8, for the right of way there claimed was clearly destroyed under s. 7, by reason of a tenancy for life."

It has been held that proof of a written parol license will defeat a forty years' user, and proof of a mere verbal license a twenty years' user. *Tickle v. Brown*, 4 A. & E. 369; *Beasley v. Clarke*, 2 New Ca. 705. See also, *Wright v. Williams*, 1 M. & W. 100; *Pye v. Mumford*, 11 Q. B. 666-672.

In *Bright v. Walker*, 1 C. M. & R. 221, the judgment describes so well the condition of the law on this point, that we here insert a great portion of it. Parke, B., says: "From hence we are led to conclude that an enjoyment for twenty years, if it give not a good title against all, gives no title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good

as against every one, it is not good against any one, and therefore not against the defendant. This view of the case derives confirmation from the 7th section, which provides as follows (see s. 40). This section, it is to be observed, in express terms excluded the time that the person (who is capable of resisting the claim to the way) is *tenant for life*; and unless the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. That construction does not appear to us to be at variance with any other part of the Act, nor lead to any absurdity. During a period of a tenancy for life, the exercise of an easement will not affect the fee: in order to do that, there must be that period of enjoyment against the owner of the fee. The conclusion, therefore, to which we have arrived is, that the Statute in this case gives no right from the enjoyment that has taken place: and as s. 6 (39) forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the Statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the *termors* to the other by the proof of possession alone."

The following cases were cited in argument in *Bright v. Walker*: *Corryton v. Lithebye*, 2 Wm. Saund. 114; *Barlow v. Rhodes*, 1 Cr. & M., s. 439; *Whalley v. Thompson*, 1 Bos. & Pull. 371.

42. Nothing in the *thirty-fourth* to the *thirty-ninth* section of this Act shall support or maintain any claim to any profit or benefit to be taken or enjoyed from or upon any land of our Sovereign Lady the Queen, her heirs and successors, or to any way or other easement, or to any water-course or the use of any water to be enjoyed or derived upon, over or from any land or water of our said Lady the Queen, her heirs and successors, unless such land, way, easement or water-course or other matter lies and is situate within the limits of some town or township, or other parcel or tract of land duly surveyed and laid out by proper authority. C. S. U. C. cap. 88, s. 44.

This section is taken from 10 & 11 Vic. cap. 5, s. 8.

It was purely a Canadian provision, applying to a new country.

How would this section affect an easement on land held under a mining location in Thunder Bay District, where the land has not been laid out into townships?

Would the survey on which the patent issued be considered "proper authority?"

PART V.

REVISED STATUTES OF ONTARIO.

CAP. 108.

43. If at the time at which the right of any person to make an entry or distress, or to bring an action or a suit to recover any land or rent, first accrues, such person is under any of the disabilities hereinafter mentioned (that is to say), *infancy, idiotcy, lunacy or unsoundness of mind*, then such person, or the person claiming through him, notwithstanding that the period of ten years or five years (as the case may be) hereinbefore limited has expired, may make an entry or a distress, or bring an action or a suit, to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability, or died (whichever of those two events first happened). 38 Vic. cap. 16, s. 5.

This section is new with regard to time. The Statute formerly gave ten years after the disability was removed. The Statute never commenced to run during the time the disability lasted; and it would only seem proper that the same time should have been given after the disability was removed to those unfortunate persons under the disability as is given to those who have not been placed under any disability.

But the present state of civilization has changed the ancient methods of law, and the old plans are not now requisite. Education has become diffused; and with the increase of knowledge, the power of protecting rights has greatly increased. When people in Canada can hear from almost any large city in the world in less than twenty-four hours, the time necessary to obtain justice is certainly shortened.

Under the former Statutes, absence from the country and coverture were considered disabilities. They are not so now.

It would appear that the Ontario Statute has made the time too short, and has taken away in some cases every opportunity for a man recovering his land. These cases will be more particularly mentioned in a subsequent portion of this book.

Could an infant bring a suit in Chancery by means of his guardian to recover his land and eject squatters? There appears no reason why an infant could not do so. This Statute gives the additional security to an infant of protecting his rights after he becomes of age, though he might bring ejectment by his guardian before.

The plaintiff proved possession of nine acres of land cleared by him since 1847, more than twenty years. Defendant's father died in 1850, defendant being then only about four years old: *held*, that the plaintiff as to this portion was clearly entitled by possession, for the Statute having run against defendant's father, would continue against defendant, notwithstanding his infancy. *Wigle v. Stewart*, 28 Q. B. 427.

The respondent filed his bill to redeem a mortgage made by his father in 1835, payable on the 4th February, 1847. The mortgagor remained in possession until his death in 1838, and his heir (then an infant) continued until some time in 1839, about a year after the death of the mortgagor, when the mortgagee obtained possession. In 1842 the mortgagee sold to one of the appellants. The respondent's bill was filed on the 18th of October, 1859. *Held*, affirming the judgment of the Court of Chancery—1st, That the respondent was entitled to redeem; 2nd, That disabilities apply to the redemption of mortgages the same as to actions to recover land or rent, and that the Statute was no bar to the relief sought by the respondent. *Hold v. Caldwell*, 6 L. J. 141, and on appeal, 7 L. J. 42. Dormant Equities Act referred to, and also following cases: *Silcox v. Sells*, 6 Grant, 237; *Wragg v. Becket*, 7 Grant, 220; *Baker v. Wetton*, 14 Sim. 426.

In 1822, A. a maniac, conveyed land to B., who then entered into possession. A. died in 1826. C., his eldest son and heir, became of age in 1829. He died in 1829; and his brother and heir, D. (the lessor of the plaintiff), became of age in 1831, and brought ejectment against B. on the ground that his father was *non compos* at the time of his executing the deed in 1822. D. brought his action more than ten years after the lunatic died, and after he came of age, and more than five years after 4 Will. IV. cap. 1. *Held*, that D. under these facts was barred from recovery by the Statute of Limitations, and that B. could not be considered in possession as the servant or bailiff of the lunatic. *Doe d. Silverthorn v. Teal*, 7 Q. B. 370.

In ejectment the plaintiff claimed as heir at law of E. F., his mother, the patentee of the lot in question under a patent issued the 13th of August, 1836. It appeared that J. F., plaintiff's father, died in 1850, and his mother, the patentee, about two years before. Defendant had been in possession since 1836. This writ was issued the 10th of September, 1861. *Held*, that the patentee having died under the disability of coverture, J. F., the plaintiff under C. S. U. C. cap. 88, s. 47, had ten years from her death, or twenty years from the time when her right accrued in 1836; and that both the periods having expired before the issue of the writ, the plaintiff was barred. The fact of the father being for two years tenant by courtesy would not give the plaintiff twenty years from his father's death. *Wigle v. Merrick*, 8 C. P. 307; remarked upon, *Farquharson v. Morrow*, 12 C. P. 311.

After the expiration of more than twenty years from the accruing of the husband's right to make an entry or bring an action, the Statute will operate as a bar during the coverture to any action by husbands and wives jointly for land owned by the wives. *Ingalls et al. v. Reid*, 15 C. P. 490.

These two cases are merely inserted here to shew what the law was formerly; but now the disability of coverture is removed.

In ejectment the plaintiff claimed as heir at law of his mother T., a daughter of H. H. died in 1839, having devised the land to his widow, A., during widowhood, and then to be equally divided among his children. She married again in 1843. T. married the plaintiff's father in 1842, being then eighteen, and they lived with her mother, he working the land, until 1844. T. died in 1848. About 1868 the plaintiff's father surrendered his interest to the plaintiff, who was born in December, 1847. Defendants claimed title by length of possession. *Held*, that the estate of the plaintiff's father in right of his wife being one in which the father could have maintained an action when they left the land in 1844, the plaintiff was barred, at all events during his father's life. *Semble*, that on the father's death he would still be barred, though he had never been in possession. *Trickey v. Seeley et al.*, 31 Q. B. 214; *Rumnell v. Henderson*, 22 C. P. 180.

The Imperial Act 3 & 4 Will. IV. cap. 27, s. 16, is different from our own. It is as follows: "Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, that is to say, infancy, COVERTURE, idiotcy, lunacy, unsoundness of mind or *absence beyond seas*."

Our legislature considered it advisable to strike off "*coverture*" and "*absence beyond seas*" as disabilities.

INFANCY.

Where a minor gives a bond to convey, and he or his heir afterwards brings ejectment against the assignee of the obligee, the defendant is entitled to a demand of possession. *Doe d. Lemoine v. Vancott*, 5 O. S. 486.

An infant will be admitted to defend as landlord by guardian. *Doe d. Sanderson v. Roe T. T.*, 3 & 4 Vic. (a)

An infant plaintiff can sue out a writ of ejectment in his own name; but after appearance entered, he cannot take any further step without having a next friend appointed; and any such further proceedings in the infant's own name will be set aside. *Campbell v. Mathewson*, 5 P. R. 91, C. L. Chamb.—Hagarty.

An estate being settled on the wife for life, with remainder to her children, the husband entered on the wife's death in 1832, and remained in possession till his death. The eldest son attained his age in 1836, and in 1855 filed a bill against the devisee of his father; it was held that the son was not barred by this section. It was contended that the plaintiff's right was barred, as he had been of age more than ten years, his right having accrued on the death of his mother in 1832. It was held, the reasonable inference was that the father entered on behalf of his children as their guardian, which was totally different from the case of a mere stranger entering upon property under similar circumstances. *Thomas v. Thomas*, 2 Kay & J. 79.

A testator who died in 1833 gave all his property to his two daughters, and appointed his brother and another executors of his will, and trustees for his wife and children. The will having been attested by only two witnesses, the real estate descended upon his two daughters, one of whom died an infant. In 1833, J., one of the executors named in the will, entered into the receipt of the rents, and paid interest on a mortgage affecting the estate. Thirty years afterwards, on a question as to whether the claim of the infant's heir was barred as against the claim of J.'s heir, it was held that, in the absence of express evidence to the contrary, J. must have been presumed to have entered on

(a) This case is taken from Robinson & Joseph's Digest, and does not appear to be reported.

behalf of the infants, and therefore time did not run against them. *Pelly v. Bascombe*, 4 Giff. 390; on appeal, 13 W. R. 306.

“Lunatic.” *Vide Fulton v. Creagh*, 3 J. & Lat. 329. *Held*, on a bill filed by a judgment creditor of the lessees, that the latter had not acquired either the fee simple subject to a perpetual rent equal to the rent reserved, or a right to a renewal by reason of the Statute of Limitations (3 & 4 Will. IV. cap. 27), length of time, or the proceedings in the lunacy matter, and that the profits received by the heir of the lessee from 1836 to 1842 were not assets of the lessee.

In the Imperial Act, 37 & 38 Vic. cap. 57, s. 4, the following words are found: “The time within which any such entry may be made, or any such action or suit may be brought, as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas, during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims.”

Our legislature have only thought it necessary to leave out the words “coverture” and “absence beyond seas,” without inserting anything similar to the Imperial Act.

In the case of *Watson v. England*, 14 Sim. 28, which was a case where a girl left her father’s house and was not heard from for over seven years, is it to be presumed she was dead? *Held*, a person ought not to be presumed to be dead from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would not have been heard of, if alive. The old law relating to the presumption of death is daily becoming more and more untenable in consequence of the increased facility of travelling. The effect of circumstances as to the presumption of death must be taken into consideration in every case.

A reference was made to the Master to inquire whether A. B. was living or dead. He reported certain facts and findings on stated evidence, shewing that after diligent inquiry nothing had been heard of A. B. for more than seven years; and he found that he was not able to state to the Court whether A. B. was living or dead. On a petition to confirm the report, the Court read and considered the evidence, and came to a conclusion presuming the death. *Grissall v. Stelfox*, 9 Jur. 890; *Wilcock v. Purchase*, 9 Jur. 891.

The presumption of death after seven years' absence does not arise where the probability of intelligence is rebutted by circumstances. *Bowden v. Henderson*, 2 Sm. & Giff. 360; and see *McMahon v. McElroy*, Ir. Rep. 5 Eq. 1.

In *Webster v. Birchmore*, 13 Ves. 362, the presumption of death from length of time was held to have relation to the commencement of the period of uncertainty as to the existence of the party when he was proved to have been in a desperate state of health, and was to have returned to his relation in six months.

A party was presumed to have died at a *particular* time during the seven years, that particular time being the hurricane months, when he was proved to have left Demerara before their expiration. *Sillick v. Booth*, 1 Y. & Coll. N. C. 117; see also *Re Beasley's Trusts*, L. R., 7 Eq. 498.

As to presumption of survivorship, *vide Re Tindall*, 30 Beav. 151. A son, first tenant in tail in remainder, left this country on the 11th April, 1858, and was never afterwards heard of. His father, tenant for life, died on the 30th May, 1858. *Held*, in 1872, that it should be presumed that the son survived the father. *Pennefather v. Pennefather*, Ir. Rep. 6 Eq. 171. *Vide Lakin v. Lakin*, 34 Beav. 443.

Where two persons die by the same accident at the same time, it is presumed that they died at the same moment,

and evidence must be given of survivorship. *Satterthwaite v. Powell*, 1 Curt. 705. But in *Sillick v. Booth*, 1 Y. & Coll. C. C. 117, it was held that evidence of health might be given. This case is doubtful. 1 Taylor on Evidence, 203.

The testator and his wife were shipwrecked and drowned at sea, one wave sweeping them both away. It was *he'd*, 1st, That the *onus* of proof that the husband was the survivor was upon the legatee; 2nd, That it was requisite to produce positive evidence in order to enable the Court to pronounce in favour of the survivorship; and 3rd, That no such evidence having been produced, the next of kin was entitled. *Underwood v. Wing*, 4 DeG. M. & G. 631; 1 Jur. N. S. 169.

By the law of England, the question of survivorship, in cases of the above description, is matter of evidence and not of positive enactment and regulation (varying according to the ages and sex of the persons dying in the same shipwreck), as it is in the French Code; and in the absence of evidence, there is no conclusion of law on the subject. *Ibid.*

There is no presumption of law arising from age and sex as to survivorship among persons whose death is occasioned by one and the same cause. Nor is there any presumption of law that all died at the same time. The question is one of fact, depending wholly upon evidence; and if the evidence does not establish the survivorship of anyone, the law will treat it as a matter incapable of being determined. *Wing v. Angrave*, 8 H. L. C. 183.

We refer to the French law on the subject, as laid down in the Code Civil of Lower Canada.

It seems more just that the ruling in *Sillick v. Booth* should prevail, and that evidence of probabilities as to age, sex and health should be admitted, even if it would not be better to settle the matter by a positive enactment, or by introducing the French system, which is as follows (Code

Civil du Bas Canada, Article 108): The presumptions of death arising from absence, whatever be its duration, do not apply in the case of marriage; the husband or wife of the absentee cannot marry again without producing positive proof of the death of such absentee. See also the following cases on this point: *Gen. Stanwix's Case*, Fearne's Post. Works, 38; *Rex. v. Dr. Hay*, 1 W. Bla. 640; Swinburn, pt. vii. s. 33; *Wright v. Netherwood*, 2 Salk. 593; *Bradshaw v. Toulmin*, 2 Dick. 633; *Hitchcock v. Beardsley*, West's Rep. t. Hardwicke, 445; *Mason v. Mason*, 1 Mer. 308; *Taylor v. Diplock*, 2 Phill. Ecc. C. 261; *In bonis Selwyn*, 3 Hagg. Ecc. Rep. 741; *Colvin v. The King's Proctor*, 1 Hagg. Ecc. Rep. 92.

The curious "Enoch Arden" case of *McArthur v. Eagleson*, determined by the Court of Queen's Bench in June, 1878, demands attention. (a)

The plaintiff claimed as patentee of the Crown. The defendant, besides denying the plaintiff's title, asserted title by length of possession, under William Davidson, who took possession in 1853, and continued in possession till 1872, when he conveyed the said land to the Canada Permanent Loan and Savings Company by mortgage dated the 10th of February, 1872, under which mortgage the Company took possession from Davidson in May, 1875, and continued thereon until March, 1876, when they sold, and conveyed the land to the defendant, by deed dated 28th of March, 1876, under which he took possession, and has remained in possession ever since.

The cause was tried at the Fall Assizes at London, 1877, before the Chief Justice of Queen's Bench, without a jury.

Plaintiff was married in 1845, and left the country in 1847. He left a wife and daughter on the land, and did not write at all to his wife, nor to any of his relations; nor did he communicate with any one in this province; nor did he come back to Canada till 1877. His wife married a man

(a) Reported.

named Davidson in 1853, and they lived on the land as man and wife. They mortgaged the land and made default and were turned off, and then the loan company foreclosed the mortgage, and afterwards sold to the defendant.

The judgment of the Court embraces all the law on the subject, and therefore it is inserted here.

HARRISON, C. J.—I am of opinion that the rule *nisi* should be discharged. As to all the points raised at the trial, subsequent consideration has confirmed the opinion which I expressed at the trial.

The only point raised since the trial, that of estoppel, must, we all think, be decided in favour of the plaintiff.

If we were to hold, on the facts of this case, that the plaintiff, being the owner of the land and not otherwise prevented from recovering possession, is estopped from claiming it as his own, we would be carrying the law of estoppel *in pais* not only further than it has yet been carried by any decided case in England or in this province, but further than warranted by the principles enunciated in the numerous cases for the application of the rule.

While holding and expressing this opinion, I freely admit that, as said by Storrs, J., in *Preston v. Mann*, 25 Conn. 128, “the doctrine of estoppel *in pais*, notwithstanding the great number of cases which have turned upon it and are reported in the books, cannot be said even yet to rest upon any determinate legal test which will reconcile all the decisions, or will embrace all transactions to which the general principles of equitable necessity, wherein it originated, demand that it should be applied. In fact, it was because it is so peculiarly a doctrine of practical equity that its technical application is so difficult, and its reduction to the form of abstract formulas is still unaccomplished.”

The real ground on which a person is precluded from proving that his representation, on which another acted to his prejudice, is false, is that to permit it would be inequitable. This is the reason that estoppel *in pais* is sometimes

described as an equitable estoppel. The jurisdiction of enforcing this equity originally belonged peculiarly to courts of equity, and does not appear to have been familiarly recognized at law until within a comparatively recent date. But now it is, with some exceptions unnecessary to be mentioned, in its application common alike to courts of law and equity. See *Horn v. Cole*, 12 Am. 111-113.

The leading case for its application in courts of law is the well known case of *Pickard v. Sears*, 6 A. & E. 475, decided in the year 1837.

Lord Denman there said: "The rule of law is clear, that where one by his words or conduct *wilfully* causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

The same learned judge two years afterwards, in *Gregg v. Wells*, 10 A. & E. 90, 97, said, in referring to *Pickard v. Sears*, 6 A. & E. 475, that "the principle of that case may be stated even more broadly than it is there laid down. A party who *negligently and culpably* stands by and allows another to contract, on the faith and understanding of a fact which he can contradict, cannot afterwards dispute the fact in an action against the person whom he has himself assisted in deceiving."

Negligence alone, although it may have afforded the opportunity for the perpetration of a fraud by means of which another party is damnified, is not of itself a ground of estoppel. *Per* Cockburn, C. J., in *Swan v. N. B. Australasian Co.*, 2 H. & C. 188-9.

The rule relating to negotiable instruments stands on a peculiar footing. *Goodwin v. Robarts*, L. R., 1 App. Cases, 476; *Rumball v. The Met. Bank*, L. R., 2 Q. B. D. 194.

By the term "wilfully," as used in *Pickard v. Sears*, must be understood, "if not that the party represents that

to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was *meant* that he should act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect." *Per* Parke, B., in *Freeman v. Cooke*, 2 Ex. 654.

The rule, as here explained, takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word, not *malo animo* or with intent to defraud or deceive, but so far wilfully, that the party making the representation on which the other acts, *means* it to be acted upon in that way. See *per* Crompton, J., in *Howard v. Hudson*, 2 E. & B. 13.

In another part of the judgment in *Freeman v. Cooke*, 2 Ex., Parke, B., at p. 664, says: "In truth, in most cases to which the doctrine of *Pickard v. Sears* has been applied, the representation is such as to amount to the contract or license of the party making it." See further, *per* Lord Chelmsford, in *Clarke v. Hart*, 6 H. L. C. 633.

If any person, by actual expressions, or by a course of conduct, so conduct himself that another may reasonably *infer* the existence of the agreement or license, and acts upon such inference, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct. See *per* Pollock, C. B., in *Cornish v. Abington*, 4 H. & N. 556, approved *per* Mellor, J., in *Thomas v. Brown*, L. R., 1 Q. B. D. 722.

The representation, whether by words or conduct, according to Pollock, C. B., in *Reynell v. Lewis*, 15 M. & W.

527, may be made "directly to the plaintiff, or made publicly, so that it may be inferred to have reached him."

To bring a case under the principle established by the decisions of *Pickard v. Sears* and *Freeman v. Cooke*, it is now essentially necessary "that the representation or conduct complained of, whether active or passive in its character, *should have been intended* to bring about the result whereby loss has arisen to the other party, or his position has been altered" (*per* Cockburn, C. J., in *Swan v. N. B. Australasian Co.*, 2 H. & C. 188), for these estoppels "only justify the acts to which the conduct of the party induces." *Per* Willes, J., in *Dunstan v. Patterson*, 2 C. B., N. S. 502.

If a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby *induces* others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has sanctioned, to the prejudice of those who have given faith to his words, or to the fair inference to be drawn from his conduct. *Per* Lord Campbell, in *Cairncross v. Lorimer*, 3 Mac. H. L. C. 829; s. c. 7 Jur. N. S. 149. See further, *Ramsden v. Dyson*, L. R., 1 H. L. C. 129, 140, 168; *Acheson v. McMurray*, 41 U. C. R. 494.

It is immaterial whether there is a misrepresentation of the fact as it actually existed, or a misrepresentation of an intention to do or abstain from doing an act which would lead to the damage of the party induced to deal on the faith of the representation. See *per* Lord St. Leonards, in *Jordan v. Money*, 5 H. L. C. 185; see further, *Citizens' Bank of Louisiana v. Bank of New Orleans*, L. R., 6 H. L. C. 352; *Fitzgerald v. Fitzgerald*, 20 Grant, 410; *Polak v. Everett*, L. R., 1 Q. B. D. 673.

Mr. Justice Brett, in *Carr v. The London & North-Western R. W. Co.*, L. R., 10 C. P. 316, 318, made an effort

to reduce the law of estoppel *in pais* to four abstract propositions.

1. If a man, by his words or conduct, *wilfully* causes another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

2. If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of things, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

3. If a man, whatever his real meaning be, so conducts himself that a reasonable man *would take his conduct to mean* a certain representation of facts, and that it was a true representation, and that the latter was *intended* to act upon it in a particular way, and he, with such belief, does act in that way, the first is estopped from denying that the facts were as represented.

4. If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of *culpable negligence* calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first, to shew that the state of facts referred to did not exist.

No attempt was made on the argument before us to bring the case within the bounds of any of these propositions, with the exception of the third; but even to that we cannot assent. The conduct of the plaintiff, in so long absenting himself from his Canadian home without communicating with his wife, brothers, or any other person in Canada, was

most extraordinary and most censurable, and yet we cannot look upon it as in any sense amounting to a representation that another person owned his land, or that he meant or that it must be held that he meant such a representation, if made, to be acted upon by any person whatever.

Indeed, we find a difficulty at every step in attempting to apply the law of estoppel in this case. I am unable to say—

1. That plaintiff at any time by words or conduct misrepresented his title to the land.

2. That such a misrepresentation, if made, was ever made to the defendant or any person under whom he claimed, or so publicly made, if made at all, as to make it a representation to the defendant or any person under whom he claims.

3. That if so made, it was ever meant or intended, or can be held to have been meant or intended, to be acted upon by the defendant or by anybody else.

4. That the defendant or anybody under whom he claims ever did act upon it.

On the contrary, it appears to me that the defendant, who was a purchaser for value of the land, instead of buying land from a person not the owner, while the owner was, as in *Hoig v. Gordon*, 17 Grant, 599, silently standing by or by word or conduct misrepresenting his title, was put upon inquiry as to the title, and purchased subject to the contingency that the plaintiff, who was the true owner, might some day appear and assert title.

The presumption is in favour of life. After the lapse of seven years the presumption is in favour of death, but not of the date of death. *Doe Hagerman v. Strong*, 4 U. C. R. 510; s. c. 8 U. C. R. 291.

The presumption of death, however, is one of fact and not of law. *Lapsley v. Grierson*, 1 H. L. C. 498; *The Queen v. Lumley*, L. R. 1 W. 196.

A man after seven years, although presumed to be dead, is not conclusively proved to be dead, or compelled to stay presumptively dead, contrary to the fact, for the benefit of a person who may have during his absence dealt either with his property or his wife upon the supposition of his death. Notwithstanding the inconvenience of the reappearance of such a man under such circumstances, I know of no principle of estoppel which can be properly held on the facts of this case to preclude his reappearance, and upon his reappearance, the assertion of all his legal rights.

The latest case on the point is *Walker et al v. Hyman*, 1 Ap. R. 345. It has a strong bearing on this case, and in accord with the opinion which I entertain of the case before us. The plaintiffs, who were makers of safes, sold a safe to one Hergert on a written order, stipulating that he was to give his notes at four months for the price; that his name was to be painted on the front of the safe, and that no title to the safe was to pass until payment of the price for the safe. The safe was accordingly delivered to Hergert, with Hergert's name painted upon it. Afterwards, defendant seeing Hergert's name upon the safe, and seeing it in Hergert's possession and believing it to be his safe, purchased the safe from him, and it was held that the plaintiffs were not estopped by their conduct from proving their ownership of the safe.

The learned judge (Burton, J., who delivered the judgment of the Court), in one part of his judgment, after reviewing the cases said (p. 353): "The party must so conduct himself that a reasonable man would consider his conduct in the light of a representation, and believe that it was meant he should act upon it, and the party for or to whom it was made must have acted on it as true;" and in a subsequent part of the same judgment (p. 355): "I am of opinion that what took place here did not amount to a representation either to the defendant or to the public generally, upon which he or they might be expected to act

in reliance on it, and that the plaintiffs are not estopped from shewing the real facts.”

It is needless to refer to any more of the many cases on the subject, for none of them are actually at variance with the rules laid down in the last case; and if they were, it would still be our duty to follow the last case upon the point, when that case is a decision of the highest court in the province.

It appears to me that much more might be said in favour of the estoppel in *Walker et al. v. Hyman* than can be argued here. In that case there was a something which looked like an assertion of the ownership of the safe inconsistent with the real ownership, and that assertion was made by the persons who were the real owners, and made as it were to the public. In this case, there is nothing but the unexplained absence of the owner of the land away from the land, and ignorant of what was being done with it for a number of years, without the semblance of assertion of title in anybody other than himself.

It is impossible to hold that the plaintiff in this case was any more in the position of an owner making a representation of title by words or conduct, or standing by at the time of the sale of property, than were the plaintiffs in *Walker et al. v. Hyman*.

It is equally impossible to hold that the defendant in this case was any more in the position of a purchaser of property on the faith of any representation by word or conduct made by the owner thereof, than was the defendant in *Walker et al. v. Hyman*.

The attempt to bring the present case within the bounds of the law of estoppel *in pais*, as understood and administered in England and this province, in my opinion entirely fails. See *Johnson v. The Credit Lyonnais Company*, 3 C. P. D. 32.

WILSON, J.—In this case I have been in very considerable doubt from the beginning. At first I was of opinion there was no defence under the Statute of Limitations against the plaintiff, because his wife was, until the last three years, in possession of the land, and because Davidson, her second husband, who claimed by and through her, had no defence, as I assumed, against the plaintiff, as she had not. But I was inclined to think that a defence by estoppel might be raised against the plaintiff, under the circumstances of the case.

Then I was of opinion that Davidson, the second husband, might successfully sustain a defence under the Statute of Limitations, although the wife could not; and after the last argument, I am of that opinion still.

It is clear that as the plaintiff is the patentee of the land, and has never parted with it, he must be entitled to recover in this action, unless he has lost his right by length of possession held against him by some one who is enabled to set it up against him. The plaintiff had, before this action was begun, been out of the actual possession of the land for thirty years. But from 1847, when the plaintiff left the land and left the province, until 1853, his wife lived upon it, and from 1853, when she married Davidson, until May, 1875, Davidson and she together lived upon the land as husband and wife. The land, from May, 1875, remained in the hands of the loan company, to whom Davidson and the woman had mortgaged it in February, 1872, until the company sold it to the defendant in March, 1876, who has had possession of it from that time until the present.

It was argued that, as the Statute enacted that when the person who was in possession of the land should “have been dispossessed or have discontinued such possession,” and the right to bring the action to recover the land “shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession,” that there was a difference in the operation of the Statute of Limitations

when the owner was *dispossessed*, and when he discontinued his possession; that is, that when the owner discontinued the possession for twenty years, he lost his title to the land, although no other person had been in possession of it in the meantime, but that in the case of a dispossession, title was not lost, unless the land was held for twenty years by another. In *Doe d. Cuthbertson v. McGillis*, 2 C. P. 124, at p. 142, Sullivan, J. decided expressly against such a contention. He held that unless another person were in possession of the land which the owner had vacated, and acquired a title by a twenty years' possession, the owner did not lose his land although he *discontinued* the possession of it.

The cases of *Doe d. Taylor v. Proudfoot*, 9 U. C. R. 503, and *Pringle v. Allan*, 18 U. C. R. 575, are opposed to the case of *Doe d. Cuthbertson v. McGillis*; but this latter decision is supported by *Smith v. Lloyd*, 9 Ex. 562, where it is said, and the opinion of Lord St. Leonard is adopted on the point, that "discontinuance of possession in the Statute means an abandonment of possession by one person, followed by the actual possession of another person, for if no one succeed to the possession abandoned, there could be no one in whose favour or for whose protection the Act could operate. To constitute discontinuance there must be both dereliction by the person who has the right, and actual possession, whether adverse or not, to protect."

Lloyd v. Henderson, 25 C. P. 253, is a decision to the like effect, founded upon the same authority.

There are other cases to which I might refer, but it is not necessary to do so.

The result is, there is no difference in the effect, under the Statute of Limitation, in law between a *dispossession* of the owner and a *discontinuance* by the owner. The only difference is that *discontinuance* is the ordinary act of the owner, *dispossession* is the forcible act of another against

the owner. Land cannot be abandoned as a mere chattel may be, to be seized by the first finder, or as an easement may be.

The possession, it has been said, which was held of the land from 1847 till 1853, was by the plaintiff's wife and the two children she had by the plaintiff.

During that time there can be no doubt that her possession was his possession. The agency there is between husband and wife for many purposes continued during that period of his absence; and I am of opinion there can be no personal possession by the wife of the husband's land in his lifetime which can be adverse to the husband, or be otherwise than his possession.

She cannot, I think, disseise him by an actual ouster so as to vest the title in herself, nor can she be a trespasser or wrong-doer upon his land, nor could he bring an action of ejectment or of trespass against her. The unity of person of husband and wife, for these and for many other purposes, still continues, notwithstanding the late legislation in favour of married women holding and dealing with their own separate estates as *femes sole*. But a wife may, by feoffment to another of her husband's land, disseise him, that is, it becomes the disseisin of the feoffee, because her feoffment is void. Vin. Abr. "Disseisin," F. pl. 8.

The next inquiry is, whether when the wife married Davidson in 1853, and he went on the land and occupied it with her, and they continued that possession until 1875 as man and wife, that kind of possession and occupancy was of such a nature as to operate adversely or prejudicially to the plaintiff?

The second marriage of the wife determined her agency for her husband the plaintiff. *Atkyns v. Pearce*, 2 C. B., N. S. 763.

In that case Cockburn, C. J., said: "Does not all the authority of the wife cease when she quits the husband's roof and goes to live with another man? Is the adulteress

still clothed with all the authority of a wife? The authority of the wife is derived from the conjugal relation; that tie severed, the authority ceases; the fact of her living in a state of adultery divests her of all authority which arises out of the marital relation."

A woman could not be convicted of stealing her husband's goods, although she went off with them in the company of a paramour.

That, however, is not because the agency continues, but because of the unity of person.

The agency is in such a case destroyed; so that, if the paramour received the goods from her or helped her in taking them, he might be convicted of the larceny of them. *Reg. v. Avery*, 5 Jur. N. S. 576; *Reg. v. Berry*, 5 Jur. N. S. 228; *Reg. v. Pitch*, 3 Jur. N. S. 524.

The woman could not have been convicted of bigamy (*The Queen v. Lumley*, L. R., 1 C. C. 196) although she *had* married Davidson, and was cohabiting with him as his wife.

Was the possession by Davidson and his supposed wife after their marriage the possession of the two jointly, or the possession of the wife alone, or of Davidson alone?

If the possession of the wife alone, I think her possession would still be the possession of the plaintiff, her lawful husband, by reason of the continuance of the unity between them.

The possession of Davidson and the woman after their marriage was the possession of the two. He entered, and she admitted him as having and claiming an interest in the land by reason of the marriage, which they believed to be a lawful marriage; and I think, after his occupation of the land for twenty years with her, he had acquired a title to the land of some kind and to some extent, as against the plaintiff.

Davidson did not claim the land as his own, but as that of the woman. He claimed such right in it which he, as

her supposed husband, had. That would be for the joint lives of himself and the woman, and if he were the survivor, then for the further period of his own life, as tenant by the courtesy for his children of that marriage. That is what he claimed for himself personally, and he contended the land would go to his children after their mother's death. He also said he did not intend to give up the land to the plaintiff, until he saw what right he had to it.

I was very much of the opinion for a time, that as Davidson claimed only in respect of his supposed wife, and as she could not claim against the plaintiff, her lawful husband, that neither could Davidson resist the claim of the plaintiff.

But I am of opinion that the title which Davidson set up was adverse from the very first to the right of the plaintiff. It was irreconcilably opposed to it, and even to his existence, and in no sense can it be said to have been or to be a recognition of his right.

Davidson was from the first a trespasser upon the land, and a disseisor of the husband, for the license of the plaintiff's wife to be there was not a sufficient license in law. She had no power to grant it as agent of her husband. That agency was *gone*, and she did not profess to act for or to bind him; and having been there for more than twenty years, claiming right and title to the land for his life, not recognizing but disputing the plaintiff's title, and claiming the land for his children after her death, he was in my opinion in a position to dispute the plaintiff's title after such twenty years' possession, and the defendant is entitled to the benefit of that limitation. If the woman had made a lease for years to another, her husband, as he could enter upon the lands as against her, could enter also upon the tenant who claimed under her, so long as the tenant had not acquired a title contrary to the lease by length of possession.

If she had sold the land to another, and the purchaser had held the land for twenty years from her, he could hold it against the husband. If the woman had died soon after the second marriage, and her second husband had remained after that twenty years in possession, the first husband could not disturb him.

So, if the second husband first entered on the land, and lived there alone say for ten years, and then the wife entered on the land and the two lived there together for say fifteen years, so that the second husband had been in possession more than twenty years, I do not think he could then be dispossessed by the first husband, although the period of limitation was made up partly by the joint occupation of himself and the plaintiff's wife.

If that be so, I do not see why the second husband, when he has been twenty years in possession, may not equally hold against the first husband, although the woman has been living on the land the whole time with the second husband, and is still living, and although the first husband may have the right of entry in respect of the wife's possession.

It does not follow that he can disturb the second husband's actual possession, which he had and claimed to have in himself, and which the wife could not interfere with.

If the wife had leased the land to another, the plaintiff might have ratified it, and might have notified the tenant to pay him the rent, but he could not ratify the second marriage or the adultery committed by reason of it and under it. In that respect there is an important difference between the position and rights of the second husband and of a tenant claiming by lease from the wife.

Possession is a matter of fact. If two persons are living on land, the possession may be wholly in the one, and the right of occupancy by license may only be in the other. In such case the title will be wholly in the one having

possession and property or claiming it, and the other will have neither the possession nor property.

In this particular case both the wife and the second husband had the possession; she claimed it, and he claimed it also by reason of his being her husband, as he supposed.

He claimed it for his life, and for the benefit of his children, and he said at the trial that he did so. As his title was not disturbed for twenty years, and as the woman could not by any right she had eject him, and as her first husband can only enter upon such right or title after the lapse of twenty years' possession against him which she still had and another had not, he has not the power to do an act in respect of her which she did not herself possess.

There was probably here no forfeiture of dower by the woman in her first husband's estate, as she did not elope from him, but lived in his house with her second husband, and so her case is not within the Statute. It was the first husband who abandoned her.

If she had left his house and gone elsewhere with her second husband, it appears she would have lost her dower to the first husband's estate. *Woodward v. Dowse*, 10 C. B., N. S. 722, and the cases in our own courts following it: *Paynell's Case*, Dyer. 107a; 2 Inst. 435, 436; and *Coot v. Berty*, 12 Mod. 232.

Perhaps the first husband could not sue for a divorce in such a case, as he had virtually deserted his wife. 1 Bishop on Marriage and Divorce, s. 710, quoting from Ayliffe, and referring to Fraser's Domestic Relations, 81, in the note. But see Brown's Law of Divorce, 26.

I do not conceive she could have proceeded against the first husband for a restitution of her conjugal rights, after having lived with the second husband for thirty years and borne him children; although it is possible, if he had deceived her by any positive act on his part which led her to believe, and which was done to make her believe, he was

dead, she might, notwithstanding her long cohabitation with the second husband, have been able to compel a restitution of conjugal rights.

The case of *Joseph v. Joseph*, 34 L. J., P. M. & A. 96, may throw some light on this proposition.

The legal rights towards the plaintiff, her legal husband, being, as I think, such as I have stated and considered them to be, then by reason of his absence, and by reason of her second marriage, and by the long possession of the land jointly by her with the second husband—these facts do, in my opinion, enable the second husband to hold the land adversely to the first husband, so that he, or those representing him, cannot be ejected by the first husband.

That right was not to the sole possession, but jointly or equally to the enjoyment of that possession with the wife. The first husband must be entitled to recover the possession which his wife had. The first and second husbands will thus be, or in effect be, tenants in common of the land.

The mortgage which the second husband and wife gave of the land, conveying it as the freehold of the wife, does not operate by estoppel, as the first husband is a stranger to it, and therefore the whole of the circumstances may be considered.

As there was a special argument upon the question of estoppel, I have to say that I do not think that it can be applied in this case against the first husband.

At one time I thought it might be, and the reason of it was this: The plaintiff left the country voluntarily, and for about five years was sailing on the lakes; and while he was on the adjoining shore of the United States, he was not very far from home, and could readily have returned to it. For the remaining twenty-five years he was in California. He was not a literate man, but he never sent any message by letter or otherwise to his wife or to his relatives. They did not know where he was, nor whether he was living or not. He could have found them or communicated with them at

any time. They could not find him or communicate with him. They had reason to believe, and they did believe, he was dead; and he must have known they believed so, or he must have known that his conduct would naturally lead them to think so; and he must also have known that they would be likely to act towards him and his property as if he were dead.

If, then, they treated him as dead under these circumstances, and dealt towards him and his property as if he were dead, and his heiress at law sold his land as her own to a *bona fide* purchaser for value, the question was whether he should be allowed to dispute the validity of that sale, which was based upon a state of facts which his own conduct had brought about, induced and created. The rule of law is, "that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." *Pickard v. Sears*, 6 A. & E. 469, 474.

There the mortgagee of chattels permitted the mortgagor to deal with them as his own, and he also carried on negotiations about these goods with an execution creditor of the mortgagor, who had seized them as the property of the mortgagor, without even telling such creditor of his claim as mortgagee, and he allowed the goods to be sold by the Sheriff as the goods of the mortgagor without forbidding it; and it was decided that he was concluded by his conduct from setting up his title to the goods to the prejudice of the purchaser at the Sheriff's sale. The word *wilfully* in the above passage is explained in *Freeman v. Cooke*, 2 Ex. 654, 663.

The rule also is, "that if a man so conduct himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that

inference, he shall afterwards be estopped from denying it.” *Per* Bramwell, B., in *Cornish v. Abington*, 4 H. & N. 549, 556.

The rule also is, “that an estoppel by negligence must be the neglect of some duty cast upon the party who is guilty of it, and the neglect must be in the transaction itself, and be the proximate cause of leading the party into the mistake.” *Swan v. North British Australasian Co. (Limited)*, 2 H. & C. 175, 181.

Here the plaintiff made no representation of any kind. His conduct was of no positive act; it was that of neglect only, and there was no duty upon him to look after his property or to find out what others were doing with it; and as he did not know what they were doing with it or had done with it, he had nothing to counteract or to forbid.

If a person builds on the land of another supposing it to be his own, and the owner, perceiving his mistake, abstains from setting him right, and leaves him to go on in his error, the owner cannot afterwards assert his title to the land on which the money was expended by the other on the supposition that the land was the property of the one who laid out the money.

It was the owner’s duty actively to interfere and to assert his adverse title; and it would be dishonest of the owner, after remaining passive, to profit by the mistake which he could have prevented. But if one build on land knowing it not to be his, equity will not prevent the legal owner from claiming the land with all the expenditure made upon it. *Ramsden v. Dyson*, L. R., 1 H. L. 129; *per* Lord Chancellor, pp. 140, 141; *per* Lord Westbury, p. 168.

If the plaintiff had been informed of the second marriage, and of the second husband living on the land, or that his daughter was about to sell the land as her own as the heiress at law of it in the belief that the plaintiff was dead, and he could reasonably by some act or means have asserted his rights in due time, and he did not interfere, his case would

be very similar to the one just referred to, and it seemed to me at one time it might be assumed against him on the evidence that the plaintiff was negligently, wantonly and wilfully keeping himself in a state of ignorance of a condition of things which he must have known would be very likely to take place after his long absence, and when he knew that all those who were interested in him must have believed, and had every reason from his own conduct to believe, he was dead, and that as against him it might be assumed he was wilfully abstaining from putting forward his claims, knowing, as it might be assumed, that others were dealing with his land, and knowing also, as it might be assumed, that they had the right to do so. But I am not prepared to say he was bound to tell where he was, or that he was still living, or that he was bound to look after his rights or property, or to inform himself whether others were dealing with them or not at any further risk than that of losing them by the law of limitations.

If he had by any act or device led it to be believed he was dead, and had resorted to such act or device with the intention of having it so believed, and he kept away or concealed himself for that purpose, and it was accordingly believed he was dead, then I think the sale by his daughter would in this case have been a valid act, whether he had previous knowledge of such sale or not, and whether he could have prevented it or not, so long as he did not in fact prevent it, when he could have prevented it.

There have no doubt been many cases of such concealment or misrepresentation, and some of them are very singular cases. *Trew v. The Railway Passenger Assurance Co.*, 6 Jur. N. S. 759; 5 H. & N. 211; 6 H. & N. 839; the opinion of Pollock, C. B., at p. 760 of 6 Jur. N. S., as to what he supposed was the case; *Joseph v. Joseph*, 34 L. J., P. M. & A. 96; *Hoig v. Gordon*, 17 Grant, 599; and the very extraordinary case mentioned as a fact, and which I presume to be so, in Vol. IX. of Household Words, p. 327,

and Vol. I. of Cassell's Mag., p. 236, and also shortly referred to in Timb's Curiosities of London. Other cases might also be referred to.

While I am not able to attach any legal duty upon the plaintiff to conclude him by estoppel, *I am of opinion he is barred by length of time so far as Davidson's interest is concerned*; and I should not have regretted it if he had been barred altogether, because he has caused, whether intentionally or not, by his conduct, which seems to be as inexplicable as it is inexcusable, a degree of distress to his wife, and an amount of injury to the children she has had by the second marriage, which can never be remedied, and he has also done as much as in him lay to bring a heavy pecuniary loss upon those who have lent money upon or have bought the land in good faith, and who no doubt thought that it was not possible a man could act as the plaintiff has done, or that he could, if he did so act, recover the land from an innocent purchaser.

ARMOUR, J.—The defendant's counsel in the argument put this question as I understood him: "Is the possession by the wife of the husband's lands in law, under every state of circumstances, the possession of the husband?" and he admitted that if this question must be answered in the affirmative, there was an end of the defence to this suit.

I am of opinion that it must be so answered; but it is not necessary to answer in the affirmative a question quite so wide as that put by the learned counsel in order to determine this suit in the plaintiff's favour. It is sufficient if the following question is answered in the affirmative, and I think it must be so answered: "Was the possession by the wife of the land in question, in law, under the state of circumstances in this case, the possession of her husband?"

It seems to me that the doctrine that the possession by the wife of the husband's lands is to be deemed the possession of the husband, depends rather upon the principle that

the husband and wife were regarded as one person in law than upon any ground of agency.

If I am right in this, then the husband, the plaintiff, was never out of possession until his wife was ejected in 1874.

Assuming, however, that this doctrine is founded upon the agency of the wife, I think in that case that it is an agency cast upon her by law by virtue of her marriage, and such an agency as she cannot divest herself of without her husband's consent.

Upon her adultery the husband is entitled to disaffirm and repudiate her agency. But he is in no way bound to do so; he may affirm and assert it. So far as the circumstances of this case are concerned, I do not see that the plaintiff has ever done anything, nor has anything been ever done by anyone else, nor has anything ever happened to disentitle him to assert and affirm in law, "This is my land, and this is my wife; and this my wife has been in possession of this my land, and her possession is my possession."

This being so, the possession of Davidson amounted to nothing, for where two persons are in possession of land, the law adjudges it to be the possession of the one who hath the right. *Reading v. Royston*, Salk. 423; s. c. 2 Ld. Raymond, 829.

Besides all this, I do not think that we should strive to give the possession of Davidson a higher character than he gives it himself in his evidence, when he says that he never claimed this land as his own, that he claimed it as his wife's and children's, for it was an uncertain thing whether the plaintiff would come back or not—it was the report one day that he was alive, and one day that he was dead; that he never made any claim to the land as his own property; that he considered it might be his wife's and children's; that he treated it in that way; that he was not satisfied whether the plaintiff was dead or alive; that the plaintiff's friends were telling him that the plaintiff would come

home, and so he would not make any improvements on the land; that he just lived on it.

I think that if we held after this, his evidence, that Davidson had acquired by such a possession a statutory title to the land in question, we would be "putting," to use the words of an eminent judge, "an estate into him in spite of his teeth." Ventris, J., in *Thompson v. Lash*, 2 Ventris, 178.

I think the rule should be discharged.

Successive disabilities *in the same person* had been held under the old law of limitation for Ireland to prevent the operation of the Statute of Limitations, and to give to the heir ten years after the death of his ancestor to enforce his claim by ejectment. Therefore, when A., a minor, having herself been dispossessed of certain lands in 1787, married in 1794, and, being a *feme covert*, attained her full age in 1796 and died in 1827, it was held that an ejectment was well brought by her heir. *Lessee of Supple v. Raymond*, 1 Hayes, Ir. Rep. 6; 2 Prest. Abst. 340; Blansh. Lim. 21, 22.

It has been held under 3 & 4 Will. IV. cap. 27, that when the person to whom the right to bring an action for the recovery of land is under a disability, and before the removal of that disability the same person falls under another disability, his right to bring an action is preserved until ten years after the removal of the latter disability. *Borrows v. Ellison*, L. R., 6 Ex. 128.

The case of *Owen v. De Beauvoir*, 16 M. & W. 547, which went up in error to the full Court, and was decided in error and reported in 6 Exch. 166, and also L. J. 1850, Ex. Chy. 177—the following judges being present: Patterson, J., Coleridge, J., Coltman, J., Maule, J., Cresswell, J., Erle, J., and Williams, J. There it was determined, "the right to rent is extinguished by the lapse of twenty years from the time of *the last payment* of such rent, although twenty years have not expired since the rent

became due. Where the Statute of Limitations extinguishes the right and does not bar the remedy, the defence under that Statute need not be specially pleaded."

The remarks of Parke, B., in *Owen v. De Beauvoir*, 16 M. & W. 567, have reference to the section under consideration, and are here inserted: "This clause, it will be observed, is made to operate only where the party intended to be protected is under disability at the time when the right to make the distress or bring the action first accrued; and if this be held to be the time when the last payment was made, the protection will in many cases be wholly illusory. Put the case, for instance, of a party regularly receiving his rent up to a given day, and becoming lunatic before the next day of payment arrives; if he should, by reason of his lunacy, omit to enforce payment of his rent for twenty years, it would seem, on all principle, that he must have been intended to be protected; but certainly, as he was not under disability at the last time of payment, he would not come within the protection of the 16th (present) section. Many other similar cases may be pointed out. This is no doubt a very serious defect, and would afford strong grounds for adopting any reasonable construction of the 3rd section (sub-s. 1, s. 5, Ont.) by which it might be remedied. But no construction would have that result; for even if by a forced and difficult construction of the sixth branch of the section, we were to hold that the point of time there designated was not the last actual payment, but the time when the rent first fell into arrear, yet the very same difficulty would exist in all the other cases pointed out by the Statute, namely, the case of a person dying seised, and leaving an heir not under disabilities, but who should become disabled before any rent has accrued due, and the case of a person claiming under a settlement, who may be a *feme sole* when her title accrues, but may be under coverture before she has any title to distrain or sue for rent; and so as to the other cases provided for by the

3rd (5th Ont.) section. The same thing may be said of the 8th (s. 5, sub-s. 6, Ont.) section. For these reasons, though we are fully sensible of the incongruities of the case, yet we feel bound to act on the plain and natural construction of the language of the 3rd section, and to hold that the right of the defendant in this case to distrain must be taken to have first accrued on the 15th day of January, 1825, when the last payment of rent was made, so that the distress made in 1845 was unlawful, all right to the rent having been extinguished before that time."

The Statute 21 Jac. I., cap. 16, s. 2, contained a proviso, that "if any person having right of entry should be, at the time his right or title *first* descended, accrued, come or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond seas," then he should have ten years after the disability was removed. The words of our Statute are very much the same, and it will be profitable to notice some of the decisions under the old Statute. In the construction of that clause, it was held that it only extended to the persons on whom the right *first* descended, and that when the Statute had once begun to run, no subsequent disability, either voluntary or involuntary, would prevent its operation. *Doe d. Duroure v. Jones*, 4 T. R. 310; *Sturt v. Mellish*, 2 Atk. 610-614; Str. 556; 1 Wils. 134; *Cotterell v. Dutton*, 4 Taunt. 826.

When the ancestor to whom the right first accrued died under a disability, which suspended the operation of the Statute, it was held that his heir must enter within ten years next after his ancestor's death, provided more than twenty years had elapsed from the time of the commencement of the ancestor's title, to the expiration of the ten years. *Doe d. George v. Jesson*, 6 East. 80.

Where an estate descended to parceners, one of whom was under a disability which continued more than twenty years, and the other did not enter within that period, the disability of the one was held not to preserve the title of the

other after the twenty years had elapsed. *Doe d. Langdon v. Rowlston*, 2 Taunt. 441.

Though under the decisions and the old common law rule, a presumption of death will arise when a person has not been heard from for seven years, yet no presumption as to the exact time of his death arises. This is a matter for the jury under the particular facts of the case. *Doe d. Knight v. Nepean*, 2 Nev. & M. 219; 2 M. & W. 894; 5 B. & Ad. 86; *Rex v. Inhabitants of Harbourn*, 2 Ad. & Ell. 540; *Rex v. Twynning*, 2 B. & Ald. 386.

It was held that where a person has not been heard from for seven years, he must be taken to have lived to the end of the seven years; unless they could prove the fact before that time. *Lambe v. Orton*, 8 W. R. 111; *Dunn v. Snowden*, 2 Dr. & Sm. 201; *Thomas v. Thomas*, Dr. & Sm. 298; *Re Benham's Trusts*, L. R., 4 Eq. 416. But see *Re Phene's Trusts*, L. R., 5 Chy. 139, where the old cases are overruled and all the cases collected, and where it was held that if a person has not been heard of for seven years, there is a presumption of law that he is dead.

With regard to legacy, *onus* of proof that legatee survived the testator is on the persons claiming the legacy. *Re Lewes' Trusts*, L. R., 6 Chy. 356; *Re Walker*, L. R., 7 Chy. 120. See also the following cases, in which it was held that the legatee died before the testator: *Rust v. Baker*, 8 Sim. 443; *Dixon v. Dixon*, 2 Br. C. C. 510.

On a reference to the Master to inquire whether a legatee was living or dead, the certificate of the Master, stating that the legatee had been abroad twenty-eight years and had not been heard of for twenty-seven years, and his opinion that he died in the lifetime of the testator, was the foundation of a decree. *Lee v. Willock*, 6 Ves. 606; see also 13 Ves. 362.

The Courts in some cases have presumed the death, and have ordered the distribution as if the legatee died in the

lifetime of the testator, on security being given to refund. Such was the case in *Dowling v. Winfield*, 14 Sim. 277.

A sum of money was set apart in 1815, to answer an annuity to a woman then supposed to be resident in India but who was never afterwards heard of. In 1837, the Master having certified upon presumption that she was dead, but without finding when she died, the Court ordered payment of the principal money to the party entitled to it, subject to the annuity. In 1842, the Master having certified upon presumption that she had died in 1822, and that no personal representative had been heard of, the Court ordered immediate payment to the same party of the accumulation since that time. And in 1847 it ordered payment of the rest of the fund to the same party, though resident abroad, upon his giving his personal security to refund in case the annuitant or her personal representative should ever establish a claim. *Cuthbert v. Purrier*, 2 Ph. C. C. 199.

44. No entry, distress, action or suit shall be made or brought by any person, who, at the time at which his right to make any entry or distress, or to bring an action or suit to recover any land or rent, first accrued, was under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within *twenty* years next after the time at which such right first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such twenty years, or although the term of *five* years from the time at which he ceased to be under any such disability, or died, may not have expired. 38 Vic. cap. 16, s. 6.

This shortens the time materially. The section in the Imperial Act 37 & 38 Vic. cap. 57, s. 5, is the same, except that where the Ontario Act has "twenty years" the Imperial Act has "thirty," and where the Ontario Act has "five," the Imperial Act has "six." The section in the Imperial Act was substituted for the 17th section of 3 & 4 Will. IV. cap. 27.

Lord St. Leonards, in commenting on the 17th section, says: "The writer attempted, without success, to prevail

upon Parliament to shorten this period of limitation" (a) (forty years). "The failure was, however, only temporary. The success of the present measure was assured by his lordship's previous efforts." (b)

The question arises under this Statute, How long a period must be shewn in order to make a good title?

Under the Statute 3 & 4 Will. IV. cap. 27, where the limitation was forty years, Lord Lyndhurst, C., said: "It was supposed that, by the operation of that Act, it was not necessary that the title should be carried back, as formerly, to a period of sixty years, but that some shorter period would be proper. It appears that conveyancers have entertained different opinions on the subject; but after considering it, I am of opinion that the Statute does not introduce any new rule in this respect, and that to introduce any new rule shortening the period would affect the security of titles. One ground of the rule was the duration of human life, and that is not affected by the Statute. It was true that in other respects the security of a sixty years' title is better now than it was before; but I think that is not a sufficient reason for shortening the period—for adopting forty years, or, as it has been suggested by a high authority, fifty years instead of the sixty. I think the rule ought to remain as it is, and that it would be dangerous to make any alteration." *Cooper v. Emery*, 1 Phill. C. C. 388. See the remarks of Lord Campbell in *Moulton v. Edmonds*, 1 DeG. F. & J. 250.

Under the present Statute and the operation of our Registry Acts, there appears no more reason for holding that the period should be sixty years than that it should be one hundred or two hundred years—the right to the land or rent is extinguished in the majority of cases by *ten* years' adverse possession; and at any rate, no matter what the

(a) Sugden's New Laws of Real Property, 2nd Edit. p. 70.

(b) Charley's Real Property Acts, p. 42.

disabilities are, by twenty. Why we should hold to the old rule, unless because it is old, it is difficult to see.

So far as recent decisions on the Statute in Ontario have gone, they all tend toward establishing a much shorter period as the rule.

A *feme sole* seised in fee married, and she and her husband ceased to be in the possession or enjoyment of the land, and went to reside at a distance from it. They both died at times which were not shewn to be within forty years from their ceasing to occupy. The wife's heir at law brought ejectment against the person in possession within twenty years of the husband's death and within five years of the passing of *this* Statute (3 & 4 Will. IV.), but more than forty years after the husband and wife ceased to occupy; it was held that the heir at law was barred by the 17th section of the Statute, though it did not appear when or how the defendant came into possession, and though proof was offered that the wife had levied no fine. *Doe d. Corbyn v. Bramston*, 3 Ad. & Ell. 63.

There is a material distinction between the case of a husband and wife making the possession derelict, as was the case in *Doe d. Corbyn v. Bramston*, and the case where the husband and wife are seised in fee in right of the wife, and the husband, by a conveyance which does not bind the wife, purports to convey the fee. Because the effect at law is, that such conveyance merely passes to the grantee of the husband that estate which he had and might have held during the continuance of the coverture. In such case the right of the wife comes within the 4th description of interest in the 3rd section of 3 & 4 Will. IV. cap. 27, (sub-s. 3, s. 5 of Ontario Act). If husband and wife, being seised in fee in right of the wife, convey to a purchaser by deed without fine, the wife if she survives, and if not, her heir, may on the husband's death recover the land, notwithstanding the purchaser may have been in possession for more than forty years. *Jumpsen v. Pitchers*, 13 Sim. 327. See also Ontario decisions.

45. Where any person is under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rents, first accrues, and departs this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of *ten* years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, first accrued, or the said period of five years next after the time at which such person died, shall be allowed by reason of any disability of any other person. C. S. U. C. cap. 88, s. 47 ; 38 Vic. cap. 16, s. 15.

This section shortens the time from *twenty* to *ten* years in the case of a succession of disabilities. In other respects it is the same as the Imperial Stat. 3 & 4 Will. IV. cap. 27, s. 18. The Imperial Stat. 37, 38 Vic. cap. 78, s. 9, substitutes "six years" for "ten" and "twelve years" for "twenty" in the Act of Will. IV.

This section is so far retrospective as to extend to a case where the first person, under disability, died before the passing of the Act. A claimant to land in the colony of New South Wales, whose ancestor died under disability in the year 1835, brought action to recover in 1856, having in the meantime been under disability himself, was barred by a colonial ordinance of 1837, which applied the 3 & 4 Will. IV. cap. 27 to the colony. *Devine v. Holloway*, 9 W. R. 642.

It is easy to imagine cases where there may be a succession of disabilities. It might happen that a protracted period would thus intervene, during all which time the rightful claimants might be under these several disabilities, and thus render the title to land insecure as against the possessor and those claiming through him. The object of this section is, where five years or more have expired from the time when the right accrued to a party dying under disability, to allow his heir only *five* years whether under disability or not. (a)

(a) Shelford's Real Property Statutes, 8th Edit. p. 193.

APPENDIX.

This Appendix embraces some late cases and certain points decided which seem applicable to the branch of law under consideration.

“USUAL ACCOUNT”—WHAT IS IT?

The following case (*Mayer v. Murray*, before the Master of the Rolls, reported in the *Law Times*, May 4th, 1878, p. 2), deserves attention: “On Wednesday, an important question arose as to what was the usual account against a mortgagee in possession, where part of the mortgaged property had been sold by him. There is apparently no direct authority on the point. In *Seton on Decrees*, no precedents of such an order is given; and in *Pemberton on Judgments*, the precedents only refer to the rents and profits that may have been received. It appeared that the mortgagee had received the rents, that various parts of the property had been sold, and the proceeds of the sale received by him. No allegation of any wilful default on the mortgagee’s part was made out by the pleadings, as proved at the hearing; but the minutes, as drawn by the Registrar, directed an account of the rents and profits and proceeds of the sale received by the mortgagee, or which, but for his wilful default, he might have received.

The Master of the Rolls was of opinion that the minutes so drawn were correct, and that in the case of a mortgagee, the account directed against him was always on the plea of *wilful default*, and, unlike the case of a trustee, nothing relative thereto need be mentioned in the pleadings or proved at the trial. The principle was correctly stated by

Mr. Fisher in his valuable book on mortgages (Fisher on Mortgages, 3rd Edit. p. 943), that 'the account usually directed against a mortgagee in possession, either of tangible property, was of what he has, or, without wilful default, might have received from the time of his taking lawful possession.' His Lordship referred to the authorities cited in support of the proposition, but he found that none of them covered the point, but in two of them, namely, *Williams v. Price*, 1 Sim. & S. 581, and *Kensington v. Bouverie*, 7 De G. M. & G. 156, the principle was distinctly recognized that if a person entered into possession of a security, he was chargeable with what he might have received but for his wilful default. The mortgagee was only of course, under the above account, liable for the proceeds of the sale, which he ought to have got in or recovered, and not for any sale at an undervalue. As was suggested in argument, if it were designed to impeach any such sales on that or any other ground, that must be by a separate proceeding, or must be clearly charged in the pleadings, and proved at the trial. The decision is satisfactory, as settling the practice for the future in drawing up such an order, as to which there appears to have been some doubt among the registrars."

Wright v. Morgan: Appeal Court Reports, Vol. I., p. 613. *Mortgage Suit—Statute of Limitations*. Held (reversing the decision of Proudfoot, V.C., 24 Grant, 475), that it is unnecessary to plead the Statute of Limitations in mortgage suits to prevent the recovery of more than six years' arrears of interest in taking the accounts before the Master, as the filing a disputing note is sufficient.

Dumble v. Larush, 25 Grant, 552.—*Plaintiff barred by Statute of Limitations*.

Dedford v. Boulton, 25 Grant, 561.—*Statute of Limitations*.—Adding “party” after lapse of twenty years.

Fuller v. Macklem, 25 Grant, 455; *Miller v. Miller*, 25 Grant, 224.—*Interest on Legacy*.

Kay v. Wilson: Appeal Court Reports, Vol. II., p. 133. *Redemption*.—*Possession by Mortgagee*.—*Statute of Limitations*.—*Wild Lands*. In 1835 D. sold certain wild lands to S., who on the same terms mortgaged them to him to secure payment of the purchase money in four years. S. sold and conveyed his equity of redemption to K. in 1838; and in 1842, default having been made under the mortgage, D. filed a bill of foreclosure against S., on which a final decree was obtained in 1845; but to this suit K., through some oversight, was not made a party. K. died in 1876; and in June of that year the plaintiff, his heir at law and devisee, heard of K.’s claim on this land for the first time, and therefore filed a bill to redeem. The defendants claimed under conveyance from D., made after the foreclosure.

It was proved that D. had gone over the land in 1839 or 1840, after his title had become absolute at law, to see if there were any trespassers on it. That he then asked one H. to look after the land, and offered to sell it to him; that he sold to one S. in 1841, who frequently went upon the land, and had it surveyed in 1853; and that the taxes had been paid by D. & S., and those claiming under them. *Held*, on appeal from the decree of Spragge, C., which was affirmed (24 Grant, 213), that there was sufficient evidence of possession having been acquired by the mortgagee more than twenty years before the bill was filed, and that the plaintiff’s right to redeem was barred. *Held* also, that where actual possession is once obtained by a mortgagee

in assertion of his legal right of visiting, it need not be maintained continuously for twenty years. A great number of cases were cited on the argument, which will be found in Appeal Court Reports, Vol. II., pp. 135, 136.

Kirchhoffer v. Stanbury, 25 Grant, 413.—*Riparian Proprietor*.—*Grant reserving Waters of a River*.—*Description*.

Re Johnston. *Johnston v. Hogg*, 25 Grant, 261.—*Liability of Executors for Negligence*.

AS TO REVIVING A JUDGMENT.

Just as we are going to press, the following decision of the Court of Appeals, reversing *Casper v. Keachie*, is to be noticed.

In the Court of Appeals, *Boyce v. O'Loane* (*Law Journal*, Ontario, 1878, p. 215). *Held*, reversing the decision of Gwynne, J., that s. 11 of 38 Vic. c. 16, does not apply to judgments; and an action may still be brought thereon within twenty years under C. S. U. C. c. 78, s. 7.

Acting on this decision, Mr. Dalton, in a late case of *Graveley v. Powell*, granted an order to revive a judgment of fifteen years' standing.

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